Supreme Court, U.S.
FILED

071292 APR 11 2008

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No. _____

In The
Supreme Court of the United States

AMANDA SPIES BORNHORST AND
TUSCARAWAS COUNTY,
Petitioners,

v.

ANTHONY HARRIS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 11, 2008

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QUESTIONS PRESENTED

1. Whether qualified immunity, which protects public officials who make bad guesses in gray areas, protects a prosecutor from a claim of false arrest where two Ohio State Courts, a Federal District Court and one Sixth Circuit Appellate Judge reviewing the case have all agreed that a reasonable basis to conclude that probable cause to arrest Harris existed?

2. Whether a confession, admitted at trial after a specific judicial determination that it was constitutional, but on appeal determined to be unconstitutionally acquired, may be considered in determining whether arguable probable cause exists sufficient to support the application of qualified immunity?

3. Whether absolute immunity protects a prosecutor from a claim of false arrest where the decision to prosecute and the decision to arrest occur simultaneously?

4. Whether either a prosecutor's decision to prosecute or a state court's finding of probable cause or a state court's finding of delinquency based upon a complete awareness of the circumstances surrounding an allegedly unconstitutional interrogation break the chain of causation required to establish a claim for false arrest under §1985 and malicious prosecution under Ohio law?

5. Whether a party can assert a new cause of action for the first time in response to summary judgment?

6. Whether the Sixth Circuit erred in reversing the District Court's grant of summary judgment to the County of Tuscarawas and its prosecutor?

PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE STATEMENT

This case was originally filed by Anthony Harris, a minor by and through Cyndi Harris against Amanda Spies Bornhorst, individually and as Prosecuting Attorney for the County of Tuscarawas, Ohio; County of Tuscarawas, Ohio; Jeffrey Urban, individually and as Police Captain for the City of New Philadelphia, Ohio; Thomas R. Staggers, individually and as Chief of Police for the City of New Philadelphia, Ohio; City of New Philadelphia, Ohio; Thomas Vaughn, individually and as Chief of Police for the Village of Millersburg, Ohio; and Village of Millersburg, Ohio. Upon reaching the age of majority, Anthony Harris was able to proceed on his own behalf. The claims against all Defendants except Spies and County of Tuscarawas have been settled and dismissed.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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PETITION FOR A WRIT OF CERTIORARI

Amanda Spies Bornhorst and Tuscarawas County respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit.

CITATIONS OF OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported at 513 F.3d 503 (6th Cir. 2008) and is reproduced at Appendix 1. The District Court's Memorandum of Opinion and Order is unofficially reported at 2006 WL 1348155 (N.D. Ohio May 16, 2006) and is reproduced at Appendix 2. *In re: Harris v. Amanda Spies Bornhorst, et al.*, the Ohio Appellate Court's review of the criminal conviction of Anthony Harris is reproduced at Appendix 3 and is unofficially reported at 2000 WL 748087 (Ohio App., 5th Dist. June 7, 2000).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit sought to be reviewed was entered on January 14, 2008. This petition is timely under 28 U.S.C § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTE

The focal point of the petition is the immunities provided to a prosecutor for claims pursuant to 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this action, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

After a trial in the Juvenile Division of the Tuscarawas County Criminal Court, Anthony Harris was adjudicated delinquent for the brutal murder of five year-old Devan Duniver. The Ohio Court of Appeals later reversed the adjudication on the basis that although his Miranda rights were read to him Anthony Harris did not knowingly, voluntarily and

intelligently waive his Miranda rights before confessing to the police that he had committed the murder. Harris subsequently sued the County of Tuscarawas and its chief prosecutor Amanda Spies Bornhorst (now Spies) alleging that Spies directed the officers to arrest Harris. The District Court determined that probable cause existed to arrest Harris and Spies was therefore protected by qualified immunity. On review, a divided panel of the Sixth Circuit held that Spies is not entitled to qualified immunity against the claim for false arrest because notwithstanding the subsequent probable cause finding, trial, and conviction, there was no basis for the prosecutor to conclude that probable cause existed if one disregards the existence of his confession. The Sixth Circuit's Judge Griffin dissented, finding that even absent the confession, probable cause to believe that Harris committed the murder existed.

A. The Murder Investigation

The day after her disappearance, Devan Duniver was discovered in a wooded area with multiple stab wounds to her neck. From the outset, Anthony Harris was one of the persons of interest for this murder because he was the first person seen coming from the area where Devan's body was later discovered after her disappearance.

The day after Devan was found dead, Anthony Harris told police that she was "a rude, nasty little girl." During their investigation, the New Philadelphia Police learned that Anthony Harris had threatened to kill Devan. Devan's aunt informed authorities of prior threats that Anthony Harris made on Devan's life.

Anthony Harris initially provided police with inconsistent statements regarding whether he was in the area where Devan's body was discovered at the suspected time of her death. However, Anthony Harris ultimately admitted that he was in that area around the time of death. Anthony Harris also admitted a prior act of violence against Devan Duniver. He pushed her down with such force that she cut her stomach on a gravel surface. Further, Anthony confessed that the murder weapon was a knife owned by a friend of his. A knife was recovered from that friend and, at the time of the probable cause hearing, was scheduled for transportation to the lab for analysis.

With this knowledge, Amanda Spies, the chief county prosecutor, suggested that the police give Anthony Harris a voice stress analysis test to help determine his degree of candor. Ms. Spies was not involved in acquiring Harris' consent, in performing the test, nor was she even present during the interview.

The police went to the Harris residence and asked Anthony Harris and his mother for permission to administer the voice stress test. Anthony Harris and his mother both consented to the test. Cyndi Harris drove her son to the New Philadelphia police station for the voice stress analyzer test knowing that the police were having trouble eliminating him as a suspect. Harris and his mother both signed a consent form for the voice stress analyzer.

Since Chief Urban was not familiar with the voice stress analyzer test, Chief Urban called in Chief

Vaughn of nearby Millersburg, Ohio to implement the test. Ms. Spies had never met nor spoken to Chief Vaughn until after Harris confessed to the murder. Ms. Spies did not know that Chief Vaughn had training in the later criticized Reid or Glen Foster interrogation methods. Ms. Spies was aware, however, that Chief Vaughn mirandized Anthony Harris and that he and his mother consented to the test.

The test was administered by Chief Vaughn, with Chief Urban present in an adjacent room with Harris' mother where they were able to see, but not hear the exchange between Chief Vaughn & Anthony Harris. Neither Chief Vaughn nor Chief Urban are alleged to be employees or agents of Tuscarawas County.

Unbeknownst to Ms. Spies, instead of performing the voice stress analysis test, Chief Vaughn began interrogating Harris. With his mother present at the police station in an adjacent room watching, Harris confessed to the police that he had murdered his five year-old neighbor, Devan Duniver. The following excerpt from the recorded interview of Anthony Harris provides an ample basis for Ms. Spies determination that probable cause existed sufficient to initiate prosecution:

Vaughn: "Okay. Was she, she was facing you, or did you knock her down and stabbed her?"

Anthony: "Knocked her down."

Vaughn: "Okay, so you knocked her down, but you didn't have to chase her?

And that's fine if you had to chase her, I just, I want as much of the truth that you can give me. Did you have to chase her at all?"

Anthony: "No."

Vaughn: "Okay, how did you push her down."

Anthony: "Well, like shoved her, and she fell down."

Vaughn: "Okay, and she fell down falling this way? Or did she fall down and you had to grab her and turn her over."

Anthony: "Ah-huh [yes]. I grabbed her and turned her over."

Vaughn: "Okay, so she fell face down. Did you grab her from like behind, or push her from behind?"

Anthony: "Pushed her from behind."

* * * * *

Anthony: "Then like I turned her over and just stabbed her in the neck."

Vaughn: "Okay. Did Devan say anything to you? Okay. Do you know if she was still alive when you left or

how long did you stay after you stabbed her?"

Anthony: "_____ [unclear] I put a knife in her neck."

* * * * *

Anthony: "I put the knife in her neck."

Vaughn: Okay, you put it in a couple of times, did you leave it in there at any time and then pull it out, or just quick-jabs?"

Anthony: "Quick."

Vaughn: "Quick. Okay. Did you, um, was any blood spurting out or was it just, like running out, or did you see any blood?"

Anthony: "I seen blood."

Vaughn: "Okay. Was she trying to yell or anything? Did she try to grab you or hit you or anything. She was just completely surprised."

Anthony: "Yeah, she was trying to kick me I bent over and put the knife in her neck

After the interrogation was completed, Ms. Spies was called to the police station and informed that

Harris had confessed to the murder. She listened to the confession on tape and immediately initiated prosecution of Anthony Harris for murdering Devan Duniver.

B. The Prosecution of Anthony Harris and His Murder Conviction

Just 24 hours after Anthony Harris' arrest, a state judge conducted a probable cause hearing, heard evidence tested by cross-examination and determined that probable cause existed. Anthony Harris subsequently stood trial for the murder.

At trial, Harris' criminal defense attorneys moved for the suppression of that confession on various Constitutional grounds. Apx. 3, *In The Matter of: Anthony R. Harris,* 2000 WL 748087. (5th Dist. July 7, 2000, 00-LW-2428). All of the relevant circumstances surrounding the confession were presented to the trial court which determined that the manner in which Anthony Harris' confession was obtained complied with the requirements of the Constitution. Accordingly, Harris' confession was presented at trial, along with substantial circumstantial evidence. Harris was adjudicated delinquent by reason of murder and sentenced him to detention until he reached age 21. Harris was defended aggressively during the six-week-long trial that was broadcast on local radio and was the subject of intense media scrutiny.

The Ohio Court of Appeals later reversed the adjudication, on the basis that Harris did not knowingly, voluntarily and intelligently waive his

Miranda rights before confessing to Chief Vaughn. The state appellate court did not find, nor has there ever been any allegation, that Anthony Harris was physically deprived or mistreated during the interview/interrogation.

Ms. Spies filed a Petition for Review with the Ohio Supreme Court which was denied on October 4, 2000. One Justice voted to hear the appeal. Subsequent to the Ohio Supreme Court denying the Petition for Review, charges were dismissed against Harris. It should be noted, however, that the Devan Duniver murder investigation remains ongoing. Law enforcement still considers Anthony Harris a strong suspect in the murder.

C. The Civil Suit

Subsequently, Harris filed this action in the U.S. District Court for the Northern District of Ohio alleging violations of 42 U.S.C. §§ 1983, 1985, and 1988, as well as the Fourth, Fifth and Fourteenth Amendments of the United States Constitution against Spies and the County of Tuscarawas, three police officers (including Chief Vaughn), and two of their respective political subsidiaries. The jurisdiction of the federal courts was invoked pursuant to 28 U.S.C. § 1331. The police officers, including Vaughn, and their employers settled with Harris and consequently those claims have been dismissed.

Against this factual backdrop, Spies and the County moved for summary judgment, which was granted by the district court finding that although a question of fact regarding Spies' involvement in the

decision to arrest precluded application of absolute immunity, Spies was entitled to qualified immunity because her belief as to the existence of probable cause was objectively reasonable. A divided panel of the Sixth Circuit reversed the district court finding that Spies' reliance upon Anthony Harris's confession was unreasonable because she should have recognized that it would not be admissible. The Sixth Circuit reached this conclusion despite well-established precedent holding that an evaluation of probable cause is not limited solely to the consideration of admissible evidence, *U.S. v. Harris*, 403 U.S. 573, 582, 91 S.Ct. 2075, 2081 (1971), and the fact that the trial court actually admitted the confession into evidence and Anthony Harris was ultimately adjudicated delinquent for the murder of Devan Duniver. This petition follows.

ARGUMENT

I. The Court of Appeals Decision Stripping Immunity From the Prosecutor for Her Best Guess in a Gray Area of Law is Inconsistent with Decisions of This Court and Other Circuits

The Sixth Circuit's decision cannot be reconciled with the clear mandate of this Court which provides that, in the context of 42 U.S.C § 1983, officials are not liable for bad guesses in gray areas; they are only liable for transgressing bright lines. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987).

This Court has long held that qualified immunity protects government officials from liability when "their

conduct does not violate clearly established statutory or constitutional rights of which a person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987). This immunity, by design, provides officials "ample room for mistaken judgment." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). It protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* at 229. The *Anderson* Court explained:

> [T]he right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of Harlow. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.... It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. 483 U.S. at 639-640.

The Sixth Circuit's opinion ignores this mandate, and focuses on whether Miranda rights and the probable cause requirement were clearly established, rather than the specific issue of whether the confession of Anthony Harris was so obviously constitutionally deficient that the prosecutor was unreasonable in her belief that it could be considered as a part of the probable cause analysis.

For purposes of the qualified immunity issue, the question is not whether Spies was correct in her belief that the interrogation of Anthony Harris complied with the Constitution, but whether she could reasonably believe that it did in making a determination of probable cause. Spies knew that both Anthony Harris and his mother consented to the voice stress analyzer test. Spies knew that a pre-test interview was a normal part of the test. Additionally, she knew that Chief Vaughn explained the Miranda rights to Anthony Harris in plain non-technical language. Although, she was aware that Anthony Harris's mother was not present when Anthony Harris was read his Miranda rights, Spies also knew that the Ohio Supreme Court in *State v. Bobo*, 585 N.E.2d 429, 432 (8th Dist. 1989) had rejected the rule accepted in other states that both a juvenile and his parent or guardian must be informed of the juvenile's rights to an attorney and to remain silent. Spies knew that Anthony Harris had not been coerced and that neither he nor his family had been threatened. She knew Anthony Harris had not been deprived of food, water or sleep. Spies also knew that Anthony Harris's mother was present at the police station when the confession took place, watching from behind a two-way mirror.

The clearest and best evidence that Spies should be protected by qualified immunity is the fact that four separate judges – two Ohio state judges, the district court and Judge Griffin of the Sixth Circuit, have all with full knowledge of all relevant facts concluded that Spies acted within the confines of the protection afforded to her by qualified immunity with respect to her actions in this case. Significantly, the trial court heard substantially the same evidence at trial and determined not only that probable cause existed but that the evidence established beyond a reasonable doubt that Anthony Harris had purposefully caused the death of Devan Duniver.

Under these circumstances, how can Spies' determination that probable cause existed be anything but a reasonable conclusion in a gray area and thus protected by qualified immunity? The Sixth Circuit's decision to remove the protection afforded to public officials who make tough, but reasonable decisions regarding complex constitutional issues on a daily basis will serve to diminish the constitutional reliability of the criminal justice system. In effect, the prosecutor in this case is punished for sharing her opinion, based upon the benefit of her formal legal training and experience, with the less formally educated police officers.

It is important to emphasize that qualified immunity is "*an immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if the case is erroneously permitted to go to trial." *Mitro v. Forsyth*, 472 U.S. 511, 526 (1985). (emphasis in original). This Court has emphasized that questions of qualified immunity

should be resolved "at the earliest possible stage in the litigation." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Accordingly, this petition should be granted.

A. The Sixth Circuit's Imposition of an Elevated Standard Requiring a Showing of Actual Probable Cause Based Solely on Admissible Evidence Rather Than Arguable Probable Cause is Inconsistent with Prior Decisions of this Court

Public officials are entitled to qualified immunity against claims of false arrest "if officers of reasonable competence could disagree" on whether there was probable cause to make an arrest. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Probable cause for an arrest exists if, at the time the arrest was made, the facts and circumstances within the police officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person to believe that an offense was committed.

The standard for determining whether probable cause for arrest exists is less stringent in the context of a qualified immunity defense than it is in the context of a suppression hearing. *See Simkunas v. Tardi*, 930 F.2d 1287 (7th Cir. 1991); *Blaylock v. City of Philadelphia*, 504 F.3d 405 (3d Cir. 2007). Notwithstanding, the Sixth Circuit imposed a standard of actual probable cause and limited its analysis solely to admissible evidence.

This Court, recognizing the "very different functions of criminal trials and preliminary determinations of probable cause," has previously held

that a public official making an evaluation of probable cause is not limited to only admissible evidence. *United States v. Harris*, 403 U.S. 573, 582 (1971).

Again, this is yet another conflict that weighs in favor of certiorari.

B. The Sixth Circuit Refusal to Conclude that the Probable Cause Hearing Broke the Chain of Legal Causation is Inconsistent with the Decisions of Other Circuits.

The Sixth Circuit ignored the effect of the Ohio judges' determination at the probable cause hearing and at trial. Just twenty-four hours after his arrest, a state judge held a probable cause hearing and determined that probable cause to believe that Harris committed the murder existed. Additionally, Harris was adjudicated delinquent on substantially the same evidence.

Other circuits have concluded that § 1983 requires a showing of proximate causation which is evaluated under the common law standard. *See, Murray v. Earle*, 405 F. 3d 278, 290 (5th Cir. 2005). It has been recognized that the chain of legal causation is broken when all the facts are presented to the grand jury or other independent intermediary where the public official does not withhold any relevant information from the independent intermediary. *See Shields v. Twiss*, 389 F.3d 142, 150 (5th Cir. 2004)("[O]nce facts supporting an arrest are placed before an independent intermediary such as a ... grand jury, the intermediary's decision breaks the chain of causation"... unless "the deliberations of that

intermediary were in some way tainted by the actions of the defendants")(internal citations omitted); *Gordy v. Burns,* 294 F.3d 722, 728 (5th Cir. 2002)(abrogated on other grounds by *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003); *Taylor v. Gregg,* 36 F.3d 453, 456 (5th Cir. 1994)("It is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party.") (citations omitted); *Egervary v. Young,* 366 F.3d 238, 248 (3d Cir. 2004) ("To the extent that the common law recognized the causal link between a complaint and the ensuing arrest, it was in the situation where 'misdirection' by omission or commission perpetuated the original wrongful behavior.") (citing *Hand,* 838 F.2d at 1428); *Townes v. City of New York,* 176 F.3d 138, 147 (2d Cir. 1999) (holding chain of causation broken between police officers' illegal search and seizure and plaintiff's subsequent conviction and imprisonment); *Smiddy v. Varney,* 665 F.2d 261, 266-68 (9th Cir. 1981) (holding police officers not liable for damages once prosecutor made independent decision to charge plaintiff); *Duncan v. Nelson,* 466 F.2d 939, 943 (7th Cir. 1972) (holding that no § 1983 cause of action exists for violation of Fifth Amendment rights resulting from admission into evidence of a coerced confession as officers did not proximately cause the violation); *See also, Hector v. Watt,* 235 F.3d 154, 161 (3d Cir. 2000) (declining to reach the question of whether proximate cause prevented a § 1983 plaintiff from suing police officers for fabricating evidence as "there is a great deal of tension in the caselaw about when official conduct counts as an intervening cause.").

Moreover, the Sixth Circuit completely ignores Ohio precedent in the case of *Vesey v. Connally* which holds that a courts finding of guilt, even though later reversed by a reviewing court, creates a conclusive presumption of probable cause that constitutes a complete defense to a later claim of malicious prosecution. *Vesey v. Connally*, 175 N.E.2d 876, 878 (Oh. Ct. App. 1960).

The finding of probable cause and subsequent adjudication on the merits, where all of the now constitutionally contested issues were presented and considered by a reasoned judiciary, breaks the chain of legal causation. The resolution of this proximate cause issue is yet another reason that certiorari is appropriate.

C. The Sixth Circuit Unnaturally Characterizes this Prosecutor's Decision to Prosecute as a Decision to Arrest

One of the greatest difficulties of a prosecution is that she must pick her cases, because no prosecutor can even investigate all of the cases in which she receives a complaint. "What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest and the proof the most certain." Jackson, *The Federal Prosecutors*, 24 J.AM. JUDICATURE SOC'Y 18 (1940).

To ensure that prosecutors "who wield this power will be guided solely by their sense of public responsibility," rather than the fear of civil liability, they are absolutely immune from civil rights suits for

malicious prosecution, and for acts "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987). Prosecutorial immunity is derived from the common law grant of immunity to judicial officers for acts within the scope of their official capacities. See, e.g., *Bradley v. Fisher*, 80 U.S. 335, 347 (1871). This broad grant of immunity was extended to prosecutors because, as indicated above, they are integrally involved in the judicial process, and they are particularly susceptible to retaliatory lawsuits. The inhibition posed by the specter of entanglement in civil litigation could lead prosecutors to refrain from trying close cases or to withhold relevant evidence in cases of arguable admissibility for fear of the consequences of not prevailing. *Imbler*, 424 U.S. at 426.

While absolute immunity deprives victims of prosecutorial misconduct of an avenue of civil redress, the plethora of safeguards built into the criminal justice system to prevent and counter such misconduct minimizes the consequences of insulating prosecutors from the additional accountability achieved from exposure to civil rights liability. *See Burns v. Reed*, 504 U.S. at 478 (1991).

To determine whether absolute immunity applies, this Court has traditionally applied a two-step approach. First, the Court seeks historical or common law support for the asserted immunity, although "'the precise contours of official immunity' need not mirror the immunity at common law." *Burns*, 504 U.S. at 493, quoting *Anderson v. Creighton*, 483 U.S. 635, 645

(1987). Second, the Court considers whether the policy considerations articulated in *Imbler* are furthered through application of immunity. *Burns*, 504 U.S. at 490.

The decisions to indict and prosecute lie at the very heart of the prosecutor's role as a judicial officer, and are perhaps the clearest examples of immunized conduct under *Imbler*. *Burns*, 504 U.S. at 493, *quoting Anderson v. Creighton*, 483 U.S. 635, 645 (1987). A prosecutor's decision on whether to prosecute is, at the very least, quasi-judicial. *Imbler*, 424 U.S. at 438. Like judges and jurors, prosecutors "exercise a discretionary judgment on the basis of evidence presented to them." *Imbler*, 424 U.S. at 423 n. 20.

By focusing on the nature of Harris' claimed injury and, therefore, his cause of action, it is apparent that Harris is really seeking to hold the prosecutor accountable for the decision to prosecute rather than for the decision to arrest that he purportedly targets.

If prosecutorial immunity could be circumvented through the mere labeling of the decision to prosecute as a decision to arrest which culminates in and causes injury only through the prosecution of the case, it would be meaningless for all but those few prosecutors who postpone their involvement in a case until it reaches the courtroom. Neither § 1983 nor this Court's limitations on immunity were intended to discourage prosecutors from fully investigating, reviewing and selecting the cases they present in court.

The rule to be gleaned from this Court's precedent is that the targeting of extra-judicial acts should not

circumvent absolute immunity where an analysis of the plaintiff's complaint reveals a disguised claim for injuries caused by a prosecutor's charging decision.

As this Court has acknowledged, absolute immunity for the decision to seek an indictment and for conducting a probable cause hearing is well-established. *See, Burns v. Reed*, 504 U.S. at 478. If immunity from liability for such activities could be circumvented by simply titling the claim "false arrest," *Imbler* would be reduced to a mere pleading rule.

D. The Sixth Circuit Completely Ignored Federal Rule of Civil Procedure 8(a) by Allowing Harris to Assert a New Cause of Action for the First Time in Response to Summary Judgment.

In his Amended Complaint, Harris alleged one claim for relief falling under 42 U.S.C. § 1983 against all Defendants. Harris sets out an exhaustive statement of alleged violations of his constitutional rights. Noticeably absent from those allegations was any claim against Tuscarawas County for a 42 U.S.C. § 1983 Brady violation. Harris never made any attempt to amend his Amended Complaint to add such a claim. In 177 paragraphs, Harris' Amended Complaint fails to provide any notice to these defendants that Harris was pursuing recovery for an alleged Brady violation. Since Harris failed to follow the basic rules of pleading, the District Court held that he was barred from asserting a new cause of action. Federal Rule of Civil Procedure 8(a). Notwithstanding, the Sixth Circuit held that the mere questioning of a witness on deposition provided

sufficient notice to the Defendant that a Brady claim was being asserted.

The federal rules are clear that plaintiff must state sufficient facts to place the defendant on notice of the claims asserted against him by pleading "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." FED. R. CIV. P. 8(a)(2) (in relevant part). However, discovery is broad: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." FED R. CIV. P. 26(b)(1) (in relevant part).

Objections based upon lack of relevancy need not be raised at the time of the deposition:

> Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have being obviated or removed if presented at that time.

FED. R. CIV. P. 32(d)(3)(A).

Further, despite the lack of relevancy of the questions to the claims asserted, absent a privilege or protective order, a deponent must answer questions posed at a discovery deposition: "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(3)(4)." FED. R. CIV. P. 30(d)(1).

In light of this, the Sixth Circuit's determination that Defendants should have been aware that Plaintiff was pursuing a Brady claim is unsupported. At most, Defendants could reasonably be aware that Plaintiff was utilizing the discovery process to determine whether a potential Brady claim existed. If Plaintiff believed that a Brady claim existed, it was his obligation to amend his complaint to provide Defendants with the notice required under Federal Rule of Civil Procedure 8.

Notwithstanding, the Sixth Circuit ignored this clearly set out Rule of Civil Procedure.

1. Even if Harris had Properly Alleged a Brady Violation, Tuscarawas County Did Not Violate Harris' Brady Rights

Although the Sixth Circuit determined that Anthony Harris could advance his *Brady* claims without actually pleading it, the Sixth Circuit then ignored the substance of the claim and failed to even analyze it. If it had, the Sixth Circuit should have concluded that Anthony Harris' *Brady* rights were not violated.

To establish a *Brady* violation Harris must show: 1) the evidence at issue is favorable to the accused; 2) the evidence was suppressed by the state; and 3) prejudice must have occurred. *Strickler v. Greene*, 527 U.S. 263 (1999). Harris must make the difficult showing, not that there was a reasonable possibility, but that there was a reasonable probability of a different result. *Id.* at 280. In *Strickler*, this Court found that even if an important witness's testimony

were entirely stricken from the record, and the trial court could still have reasonably found the defendant guilty, there can be no *Brady* violation. *Id.* at 294. In the instant case, Harris confessed to committing the brutal murder. Obviously the trial court would have still reasonably found Harris delinquent by reason of murder – even in light of a sighting of a car that looked like Redmond's.

Further, "the constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995) (citation omitted). Where a defendant is "aware of the essential facts that would enable him to take advantage of the exculpatory evidence," a prosecutor's failure to disclose the evidence does not violate *Brady*. *Spirko v. Mitchell*, 368 F.3d 603 (6th Cir. 2004). Also, where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine. *Id. at 611.* "Any reasonable defendant would pursue an inquiry of exculpatory evidence – 'unless, of course, he already knew that the inquiry would not in fact result in exculpatory information.'" *Id. at 611.*

The assertion that evidence of a car appearing to be similar to Redmond's girlfriend being seen in the area would have, with a reasonable probability, changed the outcome of his trial is simply absurd. Harris was well aware of Jamie Redmond's existence and history. At trial, evidence of Mr. Redmond's addiction and arrest for abducting Devan, was presented. The trial court

also heard evidence that Mr. Redmond visited Devan's mother occasionally.

The record is clear that Harris was aware of the essential facts that would have enabled him to try to blame Jamie Redmond for the murder. Further, a reasonable defendant would have looked for the records from Columbus Children's Services, unless, of course, Harris already knew that the inquiry would not in fact result in exculpatory information.

CONCLUSION

This Petition for writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX 1

513 F.3d 503 (6th Cir. 2008)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-3729

[Filed January 14, 2008]

Anthony Harris,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
Amanda Spies Bornhorst, et al.,	)
Defendants-Appellees.	)
	)

Before: MOORE and GRIFFIN, Circuit Judges; McKINLEY, District Judge.*

MOORE, J., delivered the opinion of the court, in which McKINLEY, D. J., joined. GRIFFIN, J. (pp. 18-21), delivered a separate opinion concurring in part and dissenting in part.

* The Honorable Joseph H. McKinley, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellant Anthony Harris ("Harris") filed suit against Defendants-Appellees Amanda Spies Bornhorst ("Spies")[1] and Tuscarawas County, Ohio ("Tuscarawas") (collectively, the "defendants"),[2] asserting claims under the Fourth and Fourteenth Amendments, pursuant to 42 U.S.C. § 1983, and for malicious prosecution, defamation, and tortious interference with a prospective contract, pursuant to Ohio state law. The district court granted summary judgment in favor of the defendants on all of Harris's claims, and Harris now appeals. For the reasons set forth below, we **VACATE** the district court's grant of summary judgment in favor of the defendants on Harris's § 1983 and *Brady* claims, **REVERSE** the grant of summary judgment as to Harris's First Amendment retaliation, defamation, and tortious-interference claims, **AFFIRM** the grant of summary judgment as to all of Harris's other claims, and **REMAND** this case to the district court for further proceedings.

I. BACKGROUND

On the afternoon of June 27, 1998, Lori Duniver discovered that her five-year-old daughter, Devan, was

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[1] It appears that Spies no longer uses the surname "Bornhorst"; both parties' briefs refer to her as "Spies," as do we.

[2] Harris's complaint asserts causes of action against additional defendants, but those claims are not at issue in this appeal.

missing from her home in New Philadelphia, Ohio. The following day, Devan's body was found in a wooded area near her home. She had been stabbed seven times in the neck.

Captain Jeffrey Urban ("Urban") of the New Philadelphia Police Department led the investigation into Devan's murder. Urban identified several "persons of interest" who might have killed Devan, including Devan's mother, Lori, who had recently called a suicide hotline to report that she was depressed and considering harming herself and her children; Lori's boyfriend, Jaimie Redmond, a drug addict and felon of whom Devan was afraid, who had previously kidnapped Devan for three days and beaten her with a belt, who may have been in the neighborhood of Devan's house at the time of her disappearance, who was later found in possession of an unexplained pack of children's playing cards, and whose alibi witness was later discovered to have given a false name and Social Security number to the police; Devan's father, Richard, a violent alcoholic who had recently complained about having to pay child support for Devan and who refused to help Lori search for Devan after Devan's disappearance, claiming to be too drunk to drive; Devan's brother, Dylan, who was described by several individuals as violent and who had recently stabbed a cat; and Harris, a twelve-year-old, African-American neighbor of the (Caucasian) Dunivan family.

Harris had no criminal record, but he had once pushed or struck[3] Devan in the arm and threatened to kill her, and he was seen, soon after Devan's disappearance, near the wooded area where her body would later be found. On the day after Devan's disappearance, before her body was found, Harris approached Urban and another officer and volunteered the statement that Devan was a "rude, nasty little girl who would eat in front of him." Joint Appendix ("J.A.") at 487 (Urban Dep. at 253). Several days later, when questioned by Urban about his whereabouts at the time of Devan's disappearance, Harris gave conflicting answers.

On July 15, 1998, at Urban's request, Harris's mother, Cyndi Harris ("Cyndi") brought Harris to the police station for a voice-stress analysis ("VSA"), which Urban described as being similar to a polygraph, or lie-detector, test. The VSA was to be conducted by Millersburg, Ohio police chief Tom Vaughn ("Vaughn"). Upon Harris's arrival at the station, Vaughn took him into a room with a one-way mirror, while Urban and Cyndi sat in an adjacent room from which they could, through the mirror, see (but not hear) the conversation between Vaughn and Harris. Cyndi was told that Vaughn would conduct a pre-test interview to relax Harris and then perform the VSA.

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[3] Spies testified during her deposition that Harris had struck Devan. J.A. at 783 (Spies Dep. at 282-83). Harris has variously characterized his action as hitting or tapping Devan, J.A. at 703 (Urban-Harris Conversation Tr. at 264), and as pushing her, J.A. at 90 (Suppression Hr'g Tr. at 2 (Vaughn Interrogation Recording)).

Once inside the interview room, however, Vaughn informed Harris of his *Miranda*[4] rights and then proceeded to interrogate him about the murder. Under Vaughn's persistent questioning, Harris confessed to having killed Devan, but many aspects of Harris's confession conflicted with the known facts of the murder. When asked to provide a written statement, Harris asked to speak with his mother and then immediately recanted his confession.

Upon learning that Harris had confessed, Urban telephoned Spies, the Tuscarawas County Chief Prosecutor, who came to the station and listened to the tape of Vaughn's interrogation and Harris's confession. At Spies's direction, Urban then arrested Harris and transported him to a detention facility.

Harris was subsequently tried in a juvenile court and convicted of the murder of Devan Duniver. On March 17, 1999, he was sentenced to a term of incarceration to last until his twenty-first birthday. On June 7, 2000, however, the Ohio Court of Appeals reversed his conviction, on the ground that the juvenile court had improperly denied a motion to suppress his confession, which was coerced in violation of his Fifth Amendment privilege against self-incrimination. *In re Harris*, No. 1999AP030013, 2000 WL 748087 (Oh. Ct. App. June 7, 2000).

On June 8, 2000, Harris was released from prison. Spies held a press conference that day, at which she stated, "[F]rankly, in my heart and in my gut, I feel

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[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

that Anthony Harris is responsible for the murder of Devan Duniver." J.A. at 725 (Spies Dep. at 42-45). No further charges were ever filed against Harris, and no one has since been arrested for or convicted of Devan's murder.

Harris filed the instant suit in the United States District Court for the Northern District of Ohio in August 2003. The following year, he applied to enlist in the Marine Corps. During the application process, he disclosed to Marine Corps Master Sergeant Mark Baker ("Baker") that he had been convicted of and incarcerated for murder and that the conviction had later been reversed. Harris signed a release permitting the Marine Corps to access the police and court records pertaining to his criminal case. Baker then instructed Marine Corps Staff Sergeant William Brahen ("Brahen") to go to the New Philadelphia courthouse and retrieve those records.

When Brahen arrived in Spies's office and requested the documents, Spies reacted by saying, in a hostile tone of voice, "[A]re you fucking kidding me?" J.A. at 1372-73 (Brahen Dep. at 25-26). She asked Brahen to accompany her to a conference room, where she "proceeded to tell [him] a little bit about the case and what happened." J.A. at 1373 (Brahen Dep. at 26). She asked Brahen whether "the Marine Corps would actually take Anthony Harris into the Marines." *Id.* (Brahen Dep. at 28). Brahen became uncomfortable and asked Spies to speak with Baker on the telephone. Spiesagreed and proceeded to inform Baker that Harris would always be a suspect in the murder of Devan Duniver because there were no other suspects. She also mentioned that Harris had filed the instant

civil suit against her. The Marine Corps subsequently declined to allow Harris to enlist, citing his continuing status as a suspect in the murder and the fact that his conviction had been reversed on a technicality.

In his Amended Complaint, Harris asserts claims for Fourth, Fifth, and Fourteenth Amendment violations and First Amendment retaliation, pursuant to 42 U.S.C. § 1983; a conspiracy to interfere with his civil rights, pursuant to 42 U.S.C. §1985; and Ohio state-law claims for aiding and abetting, malicious prosecution, defamation, and tortious interference with a prospective business relationship. After Harris settled his claims against all of the other defendants, Spies and Tuscarawas moved for summary judgment on all of his claims against them. On May 16, 2006, the district court granted the motion, dismissing with prejudice all of Harris's claims. Harris now appeals.

II. JURISDICTION

The district court possessed jurisdiction over Harris's federal claims pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over Harris's state claims pursuant to 28 U.S.C. § 1367(a). We have jurisdiction over Harris's appeal from the district court's final judgment pursuant to 28 U.S.C. § 1291.

III. ANALYSIS

A. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the burden of showing the absence of any genuine issues of material fact. *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 934 (6th Cir. 2000). Once the movant has satisfied its burden, the nonmoving party must produce evidence showing that a genuine issue remains. *Id.*

The court must credit all evidence presented by the nonmoving party and draw all justifiable inferences in that party's favor. *Id.* The nonmovant must, however, "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Summary judgment is proper when the nonmoving party has had adequate time for discovery and yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. We review a district court's grant of summary judgment de novo. *See, e.g., Spencer v. Bouchard*, 449 F.3d 721, 727 (6th Cir. 2006).

B. Immunity

1. Absolute Immunity

In the district court, Spies argued that she was entitled to both absolute and qualified immunity for her alleged role in deciding that Harris should be arrested on the day of his confession. The district court

determined that Spies could not invoke absolute immunity, because she did not make the arrest decision within the scope of her role as an advocate, but that she was entitled to qualified immunity, because she reasonably concluded that probable cause existed to support the arrest.

"The analytical key to prosecutorial immunity . . . is advocacy—whether the actions in question are those of an advocate." *Skinner v. Govorchin*, 463 F.3d 518, 525 (6th Cir. 2006)(internal quotation marks omitted). "If the challenged actions of the prosecutor were not performed in his role as advocate, if they do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings, then only qualified immunity applies." *Id.* (internalquotation marks and brackets omitted). In other words, "[p]rosecutors are not absolutely immune . . . when they perform administrative, investigative, or other functions." *Holloway v. Brush*, 220 F.3d 767, 775 (6th Cir. 2000) (en banc).

In *Ireland v. Tunis*, 113 F.3d 1435 (6th Cir.), *cert. denied*, 522 U.S. 996 (1997), weelaborated on the distinction between prosecutorial actions that are and those that are not protected by absolute immunity:

> Absolute prosecutorial immunity is justified "only for actions that are connected withthe prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." A prosecutor [is] therefore absolutely immune from suit for soliciting false testimony from witnesses and participating in a probable cause hearing that led to the issuance of a search warrant, *but not*

> *for giving legal advice to the police regarding the use of hypnosis as an investigative technique and the existence of probable cause to arrest.* For this latter type of prosecutorial activity, administrative or investigative acts unrelated to judicial proceedings, qualified immunity is all that is available.

Id. at 1445 (emphasis added) (internal citations omitted) (quoting *Burns v. Reed*, 500 U.S. 478, 494 (1991)).

Subsequently, in *Prince v. Hicks*, 198 F.3d 607 (6th Cir. 1999), we affirmed the denial of absolute immunity to a prosecutor who advised police that probable cause existed to arrest a suspect. In so holding, we relied upon the Supreme Court's opinion in *Burns v. Reed*, 500 U.S. 478 (1991).

> In *Burns*, two police officers investigating a shooting of two boys suspected that the mother had multiple personalities and may have been responsible for the crime. The two officers contacted the chief deputy prosecutor to inquire as to thelegality of subjecting the mother to hypnosis. The prosecutor advised the police officers that they could proceed. After the hypnosis session, upon hearing thestatements the mother had made, the prosecutor advised the officers that they "probably had probable cause" to arrest the mother. The Supreme Court held that "advising the police in the investigative phase of a criminal case is [not] so 'intimately associated with the judicial phase of the criminal process' that it qualifies for

> absolute immunity." The Court added, "it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice."

Prince, 198 F.3d at 613 (internal citations omitted) (quoting *Burns*, 500 U.S. at 482, 493, 495).

In this case, Urban testified that he arrested Harris because Spies told him to, and that he had no input into the decision to make the arrest. J.A. at 560 (Urban Dep. at 540-41). As this testimony demonstrates, and as Spies does not deny,[5] Spies went beyond merely advising the police; she *instructed* them to arrest Harris, without soliciting any officer's opinion. Accordingly, the districtcourt correctly determined that Spies was acting in an administrative or investigative capacity and is, therefore, not entitled to absolute immunity.

2. Qualified Immunity

The doctrine of qualified immunity precludes actions for damages against government officials on the basis of discretionary actions that do not "violate clearly established statutory or constitutional rights of

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[5] During her deposition, Spies claimed to be unable to recall whether or not she had ordered Harris's arrest, but did not dispute Urban's recollection that she had done so. J.A. at 964-66 (Spies Dep. at 1008-14).

which a reasonable person would have known." *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999) (en banc) (internal quotation marks omitted). We analyze claims of qualified immunity using a three-part test, which requires us to determine (1) whether a constitutional right was violated; (2) whether that right was clearly established and one of which a reasonable person would have known; and (3) whether the official's action was objectively unreasonable under the circumstances. *Id.* In other words, an arresting agent is entitled to qualified immunity if he or she could reasonably (even if erroneously) have believed that the arrest was lawful, in light of clearly established law and the information possessed at the time by the arresting agent. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

"The substance of all the definitions of probable cause is a reasonable ground for belief of guilt." *United States v. Romero*, 452 F.3d 610, 615-16 (6th Cir. 2006) (internal quotation marks omitted), *cert. denied*, 127 S. Ct. 1321 (2007). In determining whether an arrest is supported by probable cause, we look to the totality of the circumstances. *Id.* at 616. We consider only the information possessed by the arresting officer at the time of the arrest. *Id.* at 615; *see also Wolfe v. Perry*, 412 F.3d 707, 718-19 (6th Cir. 2005).

A finding of probable cause does not require evidence that is completely convincing or even evidence that would be admissible at trial; all that is required is that the evidence be sufficient to lead a reasonable officer to conclude that the arrestee has committed or is committing a crime. *United States v. Shaw*, 464 F.3d 615, 623 (6th Cir. 2006). A "mere

suspicion of criminality," however, is insufficient to support a finding of probable cause. *Williams ex rel. Allen v. Cambridge Bd. of Educ.*, 370 F.3d 630, 637 (6th Cir. 2004) (internal quotation marks omitted).

In this case, the district court concluded that Spies had a reasonable basis for concluding that probable cause supported Harris's arrest, because Harris's confession was corroborated by "substantial evidence." J.A. at 177-78 (Dist. Ct. Mem. at 15-16). That evidence, according to thedistrict court, included (1) Devan's aunt's report to the police that Harris had previously threatened Devan's life; (2) the fact that Harris was seen, near the time of Devan's disappearance, in the areawhere her body was later found; (3) the fact that Harris told the police five different stories concerning his whereabouts and route home on the day of Devan's disappearance; (4) Harris's prior physical altercation with Devan; (5) the confession itself; and (6) the subsequent recovery of a knife that was, for a time, suspected to be the murder weapon.[6] J.A. at 177-78 (Dist. Ct. Mem. at 15-16).

The district court erred, as a threshold matter, in concluding that Spies was free to consider any part of Harris's confession in determining whether probable

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[6] While being interrogated by Vaughn, Harris stated that he had stabbed Devan with a pocketknife belonging to his friend Zack Ellwood. J.A. at 89-91 (Suppression Hr'g Tr. at 280-82). The police subsequently recovered a knife from Zack Ellwood's home. J.A. at 2404 (Detention Hr'g Tr. at 18). That knife was determined not to be the murder weapon, and no murder weapon has ever been found. J.A. at 622 (Urban Dep. at 784), 982 (Spies Dep. at 1078-79).

cause supported his arrest. On the contrary, any reasonable prosecutor in Spies's position would have known, after listening to the tape of the confession, that it was involuntary as a matter of law and thus untrustworthy. First, as the Ohio appellate court held, any waiver of *Miranda* rights was rendered involuntary by Harris's age,lack of any previous criminal history or experience, and physical separation from his mother, in addition to the "intensity of the interview" conducted by Vaughn. *Harris*, 2000 WL 748087, at *11. More important, the techniques used by Vaughn in questioning a twelve-year-old child were coercive, irrespective of the effectiveness of the *Miranda* warning. *Id.* at *12.

In any event, Harris's attempts to give the answers demanded by Vaughn clearly demonstrated that Harris was unfamiliar with details of the crime that the perpetrator would have known. For instance, even after protracted coaxing and implicit threats by Vaughn, Harris could only guess at what Devan might do to make him (Harris) angry enough to hurt her: throw a rock at him, perhaps, or use profanity or racial invective toward him. J.A. at 82-84 (Suppression Hr'g Tr. at 273-75). When Vaughn continued to insist that Harris was guilty and again asked him why he had become angry at Devan, Harris eventually responded, "She hit me with a brick." J.A. at 8788 (Suppression Hr'g Tr. at 278-79). Harris was referring, of course, to the prior incident when hehad pushed or struck Devan after she threw a brick at him.

Vaughn, however, took Harris's reference to that incident as an admission of guilt and pressed for incriminating details, which Harris could not provide.

When asked whether the murder weapon was a stick or a knife, Harris replied, "Probably a pocket knife." J.A. at 89 (Suppression Hr'g Tr. at 280). He denied knowing whose knife it was; pressed hard by Vaughn, he said that it belonged to a friend of his mother's "or something" and then stated that one of his own friends had it. *Id.* He went on to describe, again, the prior incident when he had pushed Devan after she threw a brick at him, noting that he had immediately told Devan's mother the truth about the incident. J.A. at 90 (Suppression Hr'g Tr. at 281).

When Vaughn continued to insist that Harris discuss the murder, and Vaughn made a series of guesses—that Devan had run from Harris in the woods, that Harris had caught her and then stabbed her in the throat with a pocket knife—Harris finally broke down and said "[y]es." *Id.* He continued, however, to give factual answers at odds with the known details of the crime. He stated that he did not know how many times he had stabbed Devan, denied that it was five or six times, and finally (after Vaughn suggested that it was "[o]nce or twice") said, "Probably twice."[7] J.A. at 90-91 (Suppression Hr'g Tr. at 281-82). He denied having gotten blood on his hands; when asked whetherhe had gotten blood on the pocket knife, he replied, "Probably a little."[8] J.A. at 91 (Suppression

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[7] In fact, Devan was stabbed seven times. J.A. at 3832, 3837 (Trial Tr. at 1356, 1361).

[8] It is uncontroverted that Devan's carotid artery was partially severed, and, although the expert testimony presented at trial was not conclusive on the point, a pathologist employed by the Stark County Coroner's office testified on cross-examination by Harris's

Hr'g Tr. at 282). Harris repeatedly stated that he didn't know or wasn't sure of the answers to Vaughn's questions. *Id.* When prodded by Vaughn to describe the pocket knife, Harris could not say whether the handle was black or silver, smooth or rough. J.A. at 96 (Suppression Hr'g Tr. at 287). Despite an extensive search, no murder weapon was ever found. J.A. at 981-82 (Spies Dep. at 1074-79).

When Vaughn asked Harris to write out his confession, Harris asked for his mother. As soon as she entered the room, Harris recanted his statement. Although his mother questioned him pointedly and at length, Harris remained adamant that he had not killed Devan, that his responses to Vaughn's questions had been guesses, and that he had confessed because he "was just scared" and "[s]ome of those questions were too hard." J.A. at 108-25 (Suppression Hr'g Tr. at 299-316).

Spies listened to the recording of Vaughn's interrogation of Harris as soon as she arrived at the police station and before she ordered Harris's arrest. J.A. at 559-60 (Urban Dep. at 536-40). Accordingly, she should have known that Harris's confession was suspect and inherently untrustworthy because it was extracted from a twelve-year-old child with no previous law-enforcement experience, outside the presence of his mother, through the use of intensive interrogation techniques. Thus, the district court erred in concluding that the confession provided support for Spies's finding

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counsel that Devan probably lost a "profuse" amount of blood during the murder. J.A. at 3893-94 (Trial Tr. at 1417-18).

of probable cause for the arrest. *See Beck v. Ohio*, 379 U.S. 89, 91 (1964) (holding that whether an arrest is supported by probable cause turns upon "whether at [the moment of the arrest] the facts and circumstances within [the arresting official's] knowledge *and of which they had reasonably trustworthy information* were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense" (emphasis added)).

After the elimination of Harris's confession from consideration, an examination of the remaining record indicates that the district court improperly relied upon disputed facts in concluding that the information possessed by Spies supported her determination that probable cause existed to arrest Harris. *See, e.g.*, *Hale v. Kart*, 396 F.3d 721, 728 (6th Cir. 2005) ("If disputed factual issues underlying probable cause exist, those issues must be submitted to a jury for the jury to determine the appropriate facts."). One such alleged fact was that, "[s]uspiciously, [Harris] gave the police at least five different versions about where he was and the route he took home before finally admitting the truth." J.A. at 177 (Dist. Ct. Mem. at 15). The district court based this conclusion upon Urban's testimony, at Harris's subsequent detention hearing, that "I had about five stories I believe from Anthony on how he got home that day." J.A. at 2396 (Detention Hr'g Tr. at 9). According to Urban, Harris first told Devan's mother that he (1) had walked home from school that day, and later told Urban that he (2) had been dropped off in front of a friend's house (the "Eckert house") and had walked home from there; (3) had walked home from the Eckert house, taking a route between a fence and the wooded area where Devan's body was found, a

route that Urban described as being east of the woods; (4) had walked home from the Eckert house via a route that took him west of the woods, near Robert's Plumbing; and (5) had walked home directly through the woods. J.A. at 239596 (Detention Hr'g Tr. at 8-9).

As an initial matter, we note that there is no indication that Spies was aware of this information at the time of Harris's arrest the day before the detention hearing, and thus the information should not have been considered in determining whether the arrest itself was supported by probable cause. *Hunter*, 502 U.S. at 227 (describing the relevant considerations as "clearly established law and the information the arresting officers possessed" (internal quotation marks and brackets omitted)). In any event, descriptions (1) and (2) are not inconsistent with any of accounts (3) through (5); it is undisputed that Harris went to school on the day of the murders and that he did arrive home on foot, notwithstanding an intervening stop at the Eckert house. Taking into consideration the fact that the declarant was a twelve-year-old child being questioned about the details of one instance of a routine event—his trip home from school—five days after the fact,[9] a reasonable official would not have drawn an adverse inference from such a minor discrepancy as the omission of a stop at a friend's house.

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[9] Devan disappeared on June 27, 1998; Urban's initial interview of Harris, which was conducted at Harris's home in the presence of Harris's mother, took place on July 2. J.A. at 685 (Dep. Ex. 45 at 246).

Moreover, a review of the audiotape of Urban's interview of Harris reveals that descriptions (3) and (4) were actually suggested by Urban, not Harris; Urban pointed to various spots on a map and suggested various routes that Harris had taken, to which Harris merely assented. J.A. at 2179, 2181-82 (Dep. Ex. 44 at 102, 104-05). Harris eventually himself provided description (5), by pointing at the map and describing the path that he had taken through the woods. J.A. at 2183 (Dep. Ex. 44 at 106). When Urban later asked why Harris had initially indicated that he had skirted the woods instead of walking through them, Harris responded, "because I always walk around that and that's where there's people around those houses." J.A. at 2202 (Dep. Ex. 44 at 125). Harris then reiterated that he was now certain that he had walked through the woods rather than around it on the day in question. *Id.* Again, viewed in context, these statements more likely indicate a twelve-year-old's confusion about which particular path he had followed on a specific day than a sense of guilt or an intent to deceive.

In addition, although it is true that a knife (though not the murder weapon) was found by police and awaiting testing by the time the post-hoc probable-cause *hearing* took place, no knife had yet been recovered at the time of Harris's *arrest*. J.A. at 561 (Urban Dep. at 544-45). Finally, although Harris admitted to having once engaged in a scuffle with Devan, Urban's testimony at the probable-cause hearing established that Harris did not attack Devan without provocation in that instance but, rather, knocked her down only after she threw a brick at him. J.A. at 2402 (Probable Cause Hr'g Tr. at 16) ("He told

us that Devan had thrown a brick at him a week or two ago and that he had knocked her down and she had scraped herself up. That was the only other violence that I was aware of.").

Thus, the only evidence properly considered by the district court in determining whether Harris's arrest[10] was supported by probable cause is (1) the fact that Harris was admittedly present, shortly after Devan's disappearance, in the wooded area where her body was later found; (2) the prior threat that he allegedly made against her; and (3) his previous act of striking or pushing her after she threw a brick at him. This evidence is insufficient to give rise to probable cause to arrest Harris for Devan's murder.

First, it is well-established that an individual's mere presence at a crime scene does not constitute probable cause for an arrest. *United States v. Castro-Gaxiola*, 479 F.3d 579, 583 (8th Cir. 2007); *Holmes v. Kucynda*, 321 F.3d 1069, 1081 (11th Cir. 2003); *United States v. Ingrao*, 897 F.2d 860, 863 (7th Cir. 1990); *United States v. Garcia*, 848 F.2d 58, 60 (4th Cir.), *cert. denied*, 488 U.S. 957 (1988); *United States v. Ashcroft*, 607 F.2d 1167, 1172 (5th Cir. 1979), *cert. denied*, 446 U.S. 966 (1980). Furthermore, the Supreme Court has made clear that a probable cause finding may not be

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[10] Although Harris was transported to a juvenile center, not to an adult prison, the actions of the police nonetheless constitute an arrest. *See, e.g., State v. Hanning*, 728 N.E.2d 1059, 1061-62 (Ohio 2000) (describing several differences between juvenile and adult criminal proceedings but referring to the apprehensions of juvenile as "arrests").

based "upon information too vague and from too untested a source." *Wong Sun v. United States*, 371 U.S. 471, 482 (1963). In this case, the only evidence cited by Appellees in support of their assertion that Harris had threatened Devan consists of Urban's testimony that he was told by one of Devan's family members (described variously as either an aunt or a stepmother[11]) that Harris had, at some unspecified time and place, threatened to kill Devan. Appellees Br. at 4-5; J.A. at 493 (Urban Dep. at 276) ("It depends on where we're talking about on July 1st, because I think it was either the 30th or the first that I also received information that Anthony had threatened to kill Devan. And that increased my interest."), J.A. at 494 (Urban Dep. at 280) ("I think—I think my first information came from C.J. Duniver, which is a, I think his [sic] stepmother. . . . That Anthony had or that Devan had talked to her and said that Anthony had threatened to kill her."), J.A. at 2392 (Detention Hr'g Tr. at 5 (Urban Testimony)) ("I've learned that Devan had told her aunt, prior to being brought home that Saturday, that Anthony had threatened to kill her, and those were her words."). Both the vagueness of the information and the impossibility of determining, on the record, even the identity (to say nothing of the reliability) of the source preclude a finding of probable cause based upon this information.

Finally, the "prior act of violence" committed by Harris against Devan, Appellees Br. at 5, consisted of Harris's striking or pushing her in the arm after she

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[11] Appellees' Brief attributes the statement to an aunt, without mentioning a stepmother. Appellees Br. at 4.

threw a brick at him—an act to which Harris readily admitted and which he has described fairly consistently (and an event of which Devan's mother was aware). J.A. at 703 (Urban Dep., Ex. 45, at 264 (Tr. of July 2, 1998 Urban-Harris Conversation)) ("I just like, do you know her little brother Dylan just like, hit her back, I mean I just tapped her softly, she tripped over on her feet and the gravely [sic] and she cut her stomach, I just tapped her softly."), J.A. at 88-90 (Suppression Hr'g Tr. at 279-81 (Vaughn Interrogation Recording)) ("I pushed her and she fell over on some stone and she went in the house, told her mom, her mom like yelled at me. I told her exactly what happened. I told her the truth what happened, I pushed her by accident, she fell, cutting herself on some rocks."). This isolated squabble between neighbor children who often played together,[12] which apparently did not result in any substantial injury to Devan, does not support a finding of probable cause to arrest Harris for Devan's murder.

Even considered cumulatively, this evidence indicates only that Harris and Devan, neighbors who played together every day, once had a squabble; that a

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[12] *See* J.A. at 3282 (Trial Tr. at 811 (Lori Duniver Testimony)) ("Anthony and I had a very good relationship. . . . Just, all the kids kind of like played together. Anthony . . . and Dylan and Devan and Vincent . . . ."), J.A. at 3283 (Trial Tr. at 812) (stating that Devan and Anthony played together "[e]very day"), J.A. at 3287-88 (Trial Tr. at 816-17) ("The kids would just like—the kids were just like right here, you know, all the time. So it was like Anthony was always there, Michael was always sitting on what I would consider my front step . . . . Anthony was always there, the kids were always there.").

purported relative of Devan's, whose precise identity is unknown, may have said that Harris had once threatened Devan; and that Harris was seen on the day of the murder in an area that he frequented every day. This evidence would not lead a reasonable officer to conclude that Harris had murdered Devan. Accordingly, we hold that Harris's arrest was unsupported by probable cause. Moreover, it was clearly established at the time of Harris's arrest that the Fourth Amendment requires every arrest to be supported by probable cause, *Donovan v. Thames*, 105 F.3d 291, 297-98 (6th Cir. 1997), and—for the reasons set forth above, and viewing the evidence in the light most favorable to Harris[13]—a reasonable official in Spies's position would not have concluded that there was probable cause to arrest Harris for Devan's murder. Accordingly, because the district court erred in concluding that Spies was entitled to qualified immunity, we **VACATE** the grant of summary judgment in favor of Spies on qualified-immunity grounds as to Harris's § 1983 claims.

C. Harris's *Brady* Claim

Harris next claims that Spies violated his right to the disclosure of exculpatory evidence in the government's possession, under *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, Harris contends that Spies wrongfully and deliberately withheld evidence that Lori Duniver reported to police on the day of Devan's disappearance that she had seen a car

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[13] *See Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 310 (6th Cir. 2005).

resembling Redmond's in the neighborhood; a letter from Lori Duniver to a police officer mentioning that alleged report; and records of a public child-protection agency establishing that Redmond had beaten Devan with a belt and that Devan had stated that she was afraid of Redmond.

The district court concluded that Harris had forfeited his *Brady* claim when he failed to "seek to amend the complaint again and asserted this new cause of action for violation of his *Brady* rights for the first time in response to the [instant] motion for summary judgment." J.A. at 180-81 (Dist.Ct. Mem. at 18-19). The district court further determined that Harris's *Brady* claim was factually unsupported, because Harris "was aware of the essential facts that would enable him to take advantage of the exculpatory evidence" and should have known to check public records for such evidence. *Id.* at 181 (Dist. Ct. Mem. at 19).

We utilize a "'course of the proceedings' test to determine whether defendants in a § 1983 action have received notice of the plaintiff's claims where the complaint is ambiguous." *Cummings v. City of Akron*, 418 F.3d 676, 681 (6th Cir. 2005). The complaint in *Cummings* alleged violations of the Fourteenth Amendment and 42 U.S.C. § 1983, but we held that "statements made by both Cummings' counsel and Defendants' counsel during Cummings' deposition demonstrated] that both sides understood Cummings' suit to encompass Fourth Amendment claims" not explicitly set forth in the complaint, and we therefore addressed those claims on appeal. *Id.* Judge Griffin suggests in dissent that Harris's complaint wholly

failed to plead a *Brady* claim and thus did not fall within the range of ambiguity contemplated by *Cummings*. Harris's *Brady* claim implicating the Due Process Clause of the Fourteenth Amendment, however, fell within the scope of the allegation in his complaint that the Defendants-Appellees "engaged in a pattern of activity and course of conduct that was intended to manufacture" Anthony's conviction "in violation of the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution." J.A. at 57 (Compl. at ¶ 122); J.A. at 152 (Amend. Compl. at ¶ 129). Accordingly, Harris, whose *Brady* claim lies within the scope of his pleaded Fourteenth Amendment claim, is in an even stronger position than the plaintiff in *Cummings*, whose Fourth Amendment claim did not lie within the scope of the Fourteenth Amendment claim pleaded in his complaint. We thus determine that it is appropriate to follow the analysis established in *Cummings*.

Judge Griffin argues in dissent that the "course of the proceedings" exception to our pleading rules does not apply when the alleged notice arises during the course of a discovery deposition. Certainly, the breadth of discovery under Fed. R. Civ. P. 26(b)(1) and 32(d)(3)(A) allows questions designed to elicit admissible evidence, which at trial might be deemed irrelevant. The breadth of discovery, however, does not lead logically to Judge Griffin's conclusion that questions posed by plaintiff's counsel during depositions cannot put defendants on notice regarding a claim not specifically alleged in the complaint. This conclusion ignores the fact that the proceedings referred to in *Cummings* themselves involved a deposition. 418 F.3d at 681; *see also Torry v. Northrop*

Grumman Corp., 399 F.3d 876, 879 (7th Cir. 2005) (holding that a claim not alleged in the complaint "was (pre)tried by implied consent of the parties . . . [during] four years of discovery and other pretrial maneuverings").

The transcript of Spies's deposition indicates that all parties were aware, well before the summary judgment stage, that Harris's complaint encompassed a *Brady* claim:

> Q: Is that something that you would have found necessary to turn over to defense counsel in Anthony Harris' murder case?
>
> A: I don't believe so.
>
> Q: Even though it's in a finding or a report, of children's services[, documenting Redmond's kidnapping and physical abuse of Devan]?
>
> A: I don't believe so.
>
> Q: And can you explain to me why not?
>
> * * * *
>
> A: Because it deals with an incident that occurred almost a year prior to this particular incident; it occurred in the Columbus area; it did involve Devan, and in my mind that's really the only similarity.

> It doesn't indicate to me, you know, did she get the bruises, whatever, when she was visiting dad? Did she get the bruises from Mr. Redmond? Did she get the bruises from Lori? Did she get them because her and her brother Dylan were roughhousing, and he grabbed the belt and hit her? I don't know that.

J.A. at 934 (Spies Dep. at 888-89); *see also* J.A. at 938-41 (Spies Dep. at 902-15). Harris's counsel asked Spies repeated questions concerning the potentially exculpatory evidence—Lori Duniver'sreport to the police regarding her sighting of a vehicle that resembled Redmond's car, Lori's letter to a police officer regarding the car, and the child-protection agency report—over a sustained period that produced over two-hundred transcript pages. J.A. at 895 *et seq.* (Spies Dep. at 730 *et seq.*) Thetranscript makes clear that Harris's counsel was not merely fishing for admissible evidence but rather laying the foundation for a *Brady* claim. Harris's counsel, in fact, specifically mentioned *Brady v. Maryland*, as well as the related cases *United States v. Agurs*, 427 U.S. 97 (1976), and*United States v. Giglio*, 405 U.S. 150 (1972), and suggested that Spies had violated her obligationunder *Brady* to disclose exculpatory evidence. *See* J.A. at 898-900 (Spies Dep. at 744-53); J.A. at 927 (Spies Dep. at 860-61). Accordingly, the district court erred in concluding that Harris had forfeited this claim by failing to plead it with specificity.

The district court also erred in determining that Harris was on notice of the existence of the evidence. It is true that, under *Spirko v. Mitchell*, a prosecutor

has no obligation to disclose information where "the evidence was available to [the defendant] from other sources than the state, and he was aware of the essential facts necessary for him to obtain that evidence." 368 F.3d 603, 611 (6th Cir. 2004), *cert. denied*, 544 U.S. 948 (2005). Here, however, there is no indication that Harris knew or had reason to know that Redmond had abused Devan or that Lori Duniver had reported seeing a car similar to the one used by Redmond in her neighborhood near the time of Devan's disappearance. Accordingly, because the district court granted summary judgment on improper grounds, we **VACATE** the grant of summary judgment in favor of Tuscarawas on Harris's *Brady* claim.

D. Harris's Claim Under 42 U.S.C. § 1985

The district court granted summary judgment in favor of Spies and Tuscarawas on Harris's § 1985 claim that they conspired to deprive him of his constitutional rights. Harris does not address this claim on appeal. Accordingly, he has waived it. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005) ("[A party's] failure to raise an argument in his appellate brief constitutes a waiver of the argument on appeal.").

E. First-Amendment Retaliation

Harris alleges that Spies's statements to the Marine Corps recruiters were motivated by a desire to retaliate against him for filing the instant suit.

> In order to prove a claim for retaliation, a plaintiff must establish the following elements:

> (1) that the plaintiff was engaged in a constitutionally protected activity;(2) that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.

Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998). The district court concluded that Harris could establish neither the second nor the third element of his claim.

With regard to the second element—adverse action—the district court determined that, because the Marine Corps denied Harris's application "based upon the determination that his conviction was reversed on a technicality" and because, "[i]n the eyes of the Marines, the suppression of the plaintiff's confession by the state appellate court did not negate its existence," Spies's statement did not cause Harris's injury. J.A. at 184 (Dist. Ct. Mem. at 22).

The record, however, demonstrates that Spies's comments deterred the Marine Corps from proceeding with Harris's application for employment:

> Q: If you had obtained the letter from the prosecutor in Anthony's case that said in substance that Anthony had been wrongfully convicted of murder, and that there was no probable cause that Anthony had committed the murder, would that have been sufficient for you to pursue . . . his application?

MR. CLEARY: Objection.

A: I would also have to have something saying that he was not undergoing any further court action. If that was included in it, I would favorably endorse it to go to my next higher level; but because of the severity of the charge, I could not sign off and approve that waiver.

Q: So the fact that the prosecutor in this case said just the opposite[,] that he would always be a suspect, was significant to you in terms of not pursuing the waiver process, right?

MR. CLEARY: Objection.

A: Yes.

Q: And that was why you didn't pursue it, is that right?

MR CLEARY: Objection.

A: Correct.

J.A. at 1426 (Gonzalez Dep. at 23-24).

The district court also noted that Spies's actions "did not stop the plaintiff from proceeding with this civil suit." J.A. at 184 (Dist. Ct. Mem. at 22). That is not, however, the relevant question. "First, the issue is whether a person of ordinary firmness would be deterred, not whether [the plaintiff] himself actually was deterred." *Thomas v. Eby*, 481 F.3d 434, 441 (6th

Cir. 2007). "Second, if subsequently challenging [the state action] *ipso facto* demonstrated that the challenged action was not sufficiently adverse to undermine constitutional rights, no case alleging retaliation for exercising First Amendment rights could ever be brought." *Id.*

Spies's action would likely deter a person of ordinary firmness from pursuing a claim against the government. Harris is obviously aware that his conviction of and incarceration for a notorious crime will likely always concern potential employers. Moreover, Spies's aggressive attempt to convince one such employer of Harris's guilt has actually prevented Harris from securing the career that he wants. A more effective deterrent is difficult to imagine. Accordingly, Harris has satisfied his burden with regard to the second element.[14]

As for the third, or causation, element of the prima facie case, the district court stated only that "[t]he statement of Ms. Spies to the Marine Corps recruiter was motivated by the strength of her belief and her desire to provide accurate information, rather than

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[14] The district court mentioned, seemingly in passing, that "[t]he information provided by Ms. Spies (in response to a government inquiry) was truthful. Anthony Harris is still a suspect in the murder of Devan Duniver." J.A. at 184 (Dist. Ct. Mem. at 22). However, "[t]he law is well established that an act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." *Greene v. Barber*, 310 F.3d 889, 895 (6th Cir. 2002) (internal quotation marks and brackets omitted).

any attempt to intimidate the plaintiff into abandoning the case at bar." J.A. at 185 (Dist. Ct. Mem. at 23). In so concluding, the district court appears to have ignored the evidence that Spies referred explicitly to the instant lawsuit in her communications with the recruiters.

"Usually, the question of causation is a factual issue to be resolved by a jury, and may be satisfied by circumstantial evidence." *Hartsel v. Keys*, 87 F.3d 795, 803 (6th Cir. 1996) (internal citation omitted), *cert. denied*, 519 U.S. 1055 (1997). Here, Spies's mention of Harris's civil suit during the course of her conversation with the recruiters constitutes powerful circumstantial evidence that her other remarks were motivated by retaliatory animus. Accordingly, because a genuine issue of material fact exists with regard to Harris's retaliation claim, we therefore **REVERSE** the district court's grant of summary judgment in favor of the defendants on that claim.

F. Aiding and Abetting

The district court granted summary judgment in favor of the defendants on Harris's aiding-and-abetting claim. Harris does not address the issue in his briefs on appeal, and accordingly he has waived the claim. *Radvansky*, 395 F.3d at 311.

G. Malicious Prosecution

"Ohio has set forth the elements of a malicious prosecution claim as follows: (1) malice in instituting (or continuing) the prosecution, (2) lack of probable cause, and (3) termination of the action in favor of the defendant." *Swiecicki v. Delgado*, 463 F.3d 489, 503 (6th Cir. 2006) (citing *Trussell v. Gen. Motors Corp.*, 559 N.E.2d 732, 735 (Ohio 1990)). In this case, the district court concluded that "the plaintiff's confession alone provided probable cause to initiate and pursue the criminal charge against him," J.A. at 186 (Dist. Ct. Mem. at 24), and, moreover, that "there was substantial evidence to corroborate the plaintiff's confession," J.A. at 187 (Dist. Ct. Mem. at 25).

The Ohio courts define probable cause for the purposes of a malicious prosecution claim as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious [individual] in the belief that the person accused is guilty of the offense with which he [or she] is charged." *Rogers v. Barbera*, 164 N.E.2d 162, 166 (Ohio 1960) (quoting *Ash v. Marlow*, 20 Ohio 119 (1851)). For the same reasons that we determined Harris demonstrated that his arrest was unsupported by probable cause under federal law, we also find a lack of probable cause under the above Ohio state definition. The Ohio courts have further held, however, that

> a finding of guilty of a criminal offense by a court having jurisdiction to try and dispose of the case, *even though later and finally reversed by a reviewing court*, raises a conclusive

> presumption of probable cause and constitutes a complete defense in a later action for malicious prosecution brought by the defendant in the criminal case against the instigator thereof.

Vesey v. Connally, 175 N.E.2d 876, 878 (Oh. Ct. App. 1960) (emphasis added), *cited in Tilberry v.McIntyre*, 433 N.E.2d 636, 641 (Oh. Ct. App. 1999). "Nevertheless, fraud or unlawful means in securing a conviction which is subsequently reversed on appeal may be shown for the purpose of negativing the existence of probable cause as shown by the conviction." *Vesey*, 175 N.E.2d at 878.

> In general, [then,] throughout the United States, where the complaint on its face shows that [the] plaintiff in an action for malicious prosecution was, in the prosecution complained of, convicted in a lower court, although such conviction was subsequently dismissed by a court of superior jurisdiction, the action will be defeated unless plaintiff alleges and proves further facts tending to impeach the validity of the judgment of conviction and the presumption of probable cause arising therefrom, such as the fact that the conviction was brought about by fraudulent or perjured testimony or through undue or unfair means employed by defendant in the malicious prosecution action, a mere allegation of lack of probable cause being insufficient.

Id. at 878-79. Subsequent Ohio decisions confirm that when a conviction gives rise to a presumption of

probable cause under *Vesey*, the court hearing a § 1983 claim must "search[] the record to determine whether . . . [the] conviction[] [was] secured by fraud or unlawful means." *Courtney v. Rice*, 546 N.E.2d 461, 465 (Oh. Ct. App. 1988).

Neither we nor the Ohio courts have previously decided whether a *Brady* violation suffices to trigger the "undue or unfair means" exception to the Ohio probable-cause presumption, and other federal courts applying similar state laws have disagreed on the issue. *Compare Walker v. Tyler County Comm'n*, 11 F. App'x 270, 275 (4th Cir. 2001) (unpublished) (rejecting a malicious-prosecution claim brought pursuant to West Virginia law only because the evidence of the underlying *Brady* violation was not based upon personal knowledge and the plaintiffs had thus failed to prove "that the defendants used fraud or other unfair means to obtain [a] conviction"), *with Ware v. United States*, 971 F. Supp. 1442, 1465-66 (M.D. Fla. 1997) ("Make no mistake about it, the prosecution breached its constitutional obligation to disclose the fingerprint report to Ware. However, this breach was remedied by Judge Castagna when he vacated Ware's conviction and granted him a new trial. . . . [I]t did not affect the presumption of probable cause.").

We have previously held that a *Brady* violation may rise to the level of fraud on the court under circumstances similar to those alleged here. In *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), we held that the prosecutors, in failing to read reports in their possession that turned out to be exculpatory, "acted with reckless disregard for the truth and for the government's obligation to take no steps that prevent

an adversary from presenting his case fully and fairly." *Id.* at 351-54. "This was fraud on the court in the circumstances of this case where, by recklessly assuming Demjanjuk's guilt, they failed to observe their obligation to produce exculpatory materials requested by Demjanjuk." *Id.* at 354. Similarly, in this case, Harris claims that Spies failed to provide him with evidence that another potential suspect had been present in Devan's neighborhood near the time of her disappearance. Indeed, the defendants do not argue that Spies did not possess the information or that she disclosed it to Harris before trial. Accordingly, Harris has alleged facts and provided evidence sufficient to satisfy the second element of a prima facie case of malicious prosecution.

Ohio law defines "malice" as "an improper purpose, or any purpose other than the legitimate interest of bringing an offender to justice." *Criss v. Springfield Twp.*, 564 N.E.2d 440, 443 (Ohio 1990). "[I]f the lack of probable cause is demonstrated, the legal inference may be drawn that the proceedings were actuated by malice." *Thacker v. City of Columbus*, 328 F.3d 244, 261 (6th Cir. 2003) (internal quotation marks omitted); *see also Criss*, 564 at 443 (Ohio 1990) ("If the basis for prosecution cannot be shown, those who made the decision will appear to have acted with no basis—that is maliciously."). Because the prosecution lacked probable cause we draw an inference of malice, and conclude that Harris has satisfied the first element of the prima facie case. Finally, Harris's conviction was reversed on direct appeal, thus terminating the action in his favor. Accordingly, because Harris has established that a genuine issue of material fact exists as to his malicious-prosecution claim, we **REVERSE**

the district court's grant of summary judgment in favor of the defendants on that claim.

H. Defamation

Under Ohio law, the elements of a defamation claim, whether libel or slander, are "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc.*, 611 N.E.2d 955, 962 (Ohio Ct. App. 1992) (internal quotation marks omitted). "Because the determination of whether words are defamatory is a question of law, summary judgment is appropriate in defamation actions." *Brown v. Lawson*, 863 N.E.2d 215, 219 (Ohio Ct. App. 2006). The district court in this case concluded that Spies's statement at the press conference—"In my heart and in my gut, I feel that Anthony Harris is responsible for the murder of Devan Duniver"—did not constitute defamation because it was a protected statement of opinion. The district court further concluded that Spies's statements to the recruiters could not constitute defamation because they were truthful.

Expressions of opinion are protected under the Ohio Constitution and therefore cannot constitute defamation under state law. *Vail v. Plain Dealer Publ'g Co.*, 649 N.E.2d 182, 185 (Ohio 1995), *cert. denied*, 516 U.S. 1043 (1996). In determining whether a statement is an expression of opinion, the Ohio courts use a totality-of-the-circumstances test

mandating the consideration of "the specific language used, whether the statement is verifiable, the general context of the statement, and finally, the broader context in which the statement appeared." *Id.*

The Supreme Court has held that "expressions of 'opinion' may often imply an assertion of objective fact." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990). For example, "[i]f a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth." *Id.* We have characterized such a statement as a "mixed" expression of opinion, "which may . . . be the basis for an action for defamation, since it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Falls v. Sporting News Publ'g Co.*, 834 F.2d 611, 615 (6th Cir. 1987), *cited in Webster v. United Auto Workers, Local 51*, 394 F.3d 436 (6th Cir.), *cert. denied*, 126 S. Ct. 421 (2005).[15] We have explained the respective functions of the judge and jury as follows:

> It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct, and the function of the jury to determine whether

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[15] The defamation claim asserted in *Falls* arose under Michigan, not Ohio, law. 834 F.2d at 614-15. The elements of defamation are, however, the same in both states. *Id.*

> that meaning was attributed to it by the recipient of the communication.

Falls, 834 F.2d at 615-16.

Under the circumstances in which it was made, Spies's statement at the press conference was a mixed statement of opinion sufficient to give rise to a defamation claim. Spies made the statement during the workday, in a public venue, during an appearance at which she was accompanied by her second-in-command in the county prosecutor's office. All of these elements combined to imply that her statement was based upon facts not known to the general public. Accordingly, it is the province of a jury to determine whether the Marine Corps recruiters to whom the statements were made interpreted them as based upon such implied facts.

The district court also erred in concluding that Spies's statements to the recruiters were true and thus could not constitute defamation. Spies's statement that Harris would always be a suspect because there are no other suspects is directly contradicted by Urban's deposition testimony. Accordingly, because genuine issues of material fact persist with regard to Harris's defamation claim, we **REVERSE** the district court's grant of summary judgment in favor of Spies as to that claim.

I. Tortious Interference With a Prospective Business Relationship

Finally, Harris claims that Spies's statements to the recruiters tortiously interfered with his prospective employment relationship with the Marine Corps. Under Ohio law, "[t]he tort of interference with a business relationship occurs when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relationship with another." *McConnell v. Hunt Sports Enters.*, 725 N.E.2d 1193, 1216 (Ohio Ct. App. 1999). "The elements of tortious interference with a business relationship are (1) a business relationship, (2) the wrongdoer's knowledge thereof, (3) an intentional interference causing a breach or termination of the relationship, and (4) damages resulting therefrom." *Id.* The district court in this case determined that Spies's comments were not the cause of the Marine Corps's rejection of Harris's application and that the record-check release form signed by Harris authorized Spies's statements.

As explained above, in our discussion of Harris's First Amendment retaliation claim, the district court's conclusion that Spies's comments did not dissuade the Marines from enlisting Harris was error. Moreover, there is no evidence that the release form authorized Spies to do more than provide copies of paper records concerning the case, much less that her profane exclamation, gratuitous reference to the instant suit, and general hostility toward the recruiters and the idea of Harris's admission to the armed forces were contemplated by Harris or the Marine Corps when Harris was asked and agreed to execute the release.

Accordingly, because a genuine issue of material fact persists with regard to Harris's tortious-interference claim, we **REVERSE** the district court's grant of summary judgment in favor of Spies as to that claim.

IV. CONCLUSION

For the reasons set forth above, we **VACATE** the district court's grant of summary judgment in favor of the defendants on Harris's § 1983 and *Brady* claims, **REVERSE** the grant of summary judgment on Harris's First Amendment retaliation, defamation, and tortious-interference claims, **AFFIRM** the grant of summary judgment as to all of Harris's other claims, and **REMAND** this case to the district court for further proceedings in accordance with this opinion.

CONCURRING IN PART AND DISSENTING IN PART

GRIFFIN, Circuit Judge, concurring in part and dissenting in part. I respectfully dissent regarding the reversal of the district court's grant of summary judgment in favor of defendants on plaintiff's claims of unlawful arrest (III B 2); violation of *Brady*[1] (III C); and malicious prosecution (III G). On the remaining issues, I concur and join in the majority opinion.

I.

I agree with the majority and the district court that, based upon the present factual record, prosecutor

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

Spies was not entitled to summary judgment on her defense of absolute immunity. However, I respectfully disagree with the majority and agree with the district court that Spies was entitled to summary judgment in her favor on her defense of qualified immunity.

An arresting agent is entitled to qualified immunity "if a reasonable officer could have believed [the] arrest to be lawful, in light of clearly established law and the information the arresting officers possessed." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (internal quotation marks and brackets omitted). "Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." *Id.* (internal quotation marks omitted). "Immunity ordinarily should be decided by the court long before trial. . . . [T]he court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . years after the fact." *Id.* at 228.

"The substance of all the definitions of probable cause is a reasonable ground of belief of guilt." *United States v. Romero*, 452 F.3d 610, 615-16 (6th Cir. 2006), *cert. denied* 127 S. Ct. 1321 (2007). "When determining whether an arrest was supported by probable cause, we utilize a totality-of-the-circumstances approach." *Id.* at 616 (internal quotation omitted). "The standard of probable cause does not require indubitable or necessarily convincing evidence, but only so much reasonably trustworthy information as to warrant a prudent man in believing that the arrestee has committed or is committing an offense." *United States v. Shaw*, 464 F.3d 615, 623 (6th Cir. 2006) (internal

citation and quotations omitted). "[A] finding of probable cause may rest upon evidence which is not legally competent in a criminal trial." *Id.* (internal quotation marks omitted). In fact, "the probable cause requirement does not require that [police] possess evidence sufficient to establish [even] a prima facie case of guilt at trial. . . ." *Romero*, 452 F.3d at 616 (internal quotation marks omitted).

In the present case, the district court ruled that, "[a]t the time the plaintiff was arrested and charged, there was a reasonable basis to conclude that probable cause existed." In support of its finding, the district court stated that "there was . . . substantial evidence to corroborate [Harris's] confession":

> Devan's aunt knew about and informed authorities about the prior threat the plaintiff had made on Devan's life. It was corroborated that the plaintiff was walking alone coming home from a friend's house around the time Devan disappeared. In fact, he had been seen entering the wooded area where Devan's body was found just near the time that Devan was last seen, heading for that wooded area. Suspiciously, the plaintiff gave the police at least five different versions about where he was and the route he took home before finally admitting the truth. Anthony Harris admitted to a prior act of violence against Devan. Furthermore, the plaintiff confessed that the murder weapon was a knife owned by a friend of his. A knife was recovered and, at the time probable cause was determined, was awaiting transportation to the lab for analysis.

Although the district court erred in considering Harris's confession and the knife, the remaining evidence cited by the district court was sufficient to constitute probable cause for the arrest. Under the totality-of-the-circumstance, I conclude that the combination of the following evidence was sufficient to establish probable cause for the arrest: (1) Harris had threatened to kill the victim; (2) shortly after the homicide, Harris was seen in the wooded area near the victim's body; (3) Harris gave conflicting explanations regarding his whereabouts at the time of the killing; and (4) Harris had previously assaulted the victim. Although the record indicates that other individuals might also be suspects, in my view, the evidence relating to Harris, considered in its totality, was sufficient to cause a reasonable officer to believe that Harris had committed the homicide. Such a belief need not be correct to be reasonable. *Hunter*, 502 U.S. at 227.

II.

Next, regarding the alleged *Brady* violation, the majority opinion acknowledges that plaintiff's amended complaint does not plead a claim based upon a violation of *Brady v. Maryland*. Furthermore, it concedes that, in opposing defendants' motion for summary judgment, plaintiff did not move to amend his complaint to assert a *Brady* claim. Nonetheless, the majority reverses the summary judgment granted in favor of defendants on this unplead claim based upon the "course of proceedings" exception to our notice-pleading requirement. I respectfully disagree.

Our Federal Rules of Civil Procedure require the plaintiff to plead with specificity only a small class of cases. For instance, claims based upon fraud or mistake must be alleged with particularity. FED. R. CIV. P. 9(b). Regarding all other claims, the plaintiff must state sufficient facts to place the defendant on notice of the claims asserted against him by pleading "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." FED. R. CIV. P. 8(a)(2) (in pertinent part).

The majority opinion cites nothing contained in the amended complaint that would place defendants on notice of plaintiff's *Brady* claim. Instead, Judge Moore relies on the "course of the proceedings" exception to our pleading rules. Under this exception, claims that are tried by the mutual consent of the parties are treated as if they were pleaded. In the present case, the error of using this exception is that the alleged notice of the claim arises from questions posed at a discovery deposition. Under our rules, discovery is broad: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated *to lead to the discovery of admissible evidence*." FED. R. CIV. P. 26(b)(1) (in pertinent part; emphasis added).

Objections regarding the lack of relevancy of questions need not be raised at the time of the deposition:

> Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the

> deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

FED. R. CIV. P. 32(d)(3)(A).

Further, despite the lack of relevancy of the questions to the claims asserted, absent a privilege or protective order, a deponent must answer questions posed at a discovery deposition: "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)." FED. R. CIV. P. 30(d)(1) (in pertinent part).

Unlike *Cummings v. City of Akron*, 418 F.3d 676, 681 (6th Cir. 2005), the amended complaint is not "ambiguous" regarding the claim at issue. Moreover, "[t]aken as a whole" the amended complaint did not provide defendants with notice of an alleged *Brady* claim. *Cf. Moore v. City of Harriman*, 272 F.3d 769, 773 (6th Cir. 2001). Further, there is no indication by the questions themselves that the parties consented to the adjudication of a *Brady* claim. On the contrary, it is reasonable to believe that both counsel assumed that the deposition questions and their answers *might lead* to relevant evidence. In such an event, plaintiff would decide later whether to assert a *Brady* claim based upon the information learned through discovery. If plaintiff chose to sue for such a claim, defendants could reasonably expect notice by a motion to amend and an opportunity to be heard. Questions posed at discovery depositions are often far-ranging. Most importantly, the fundamental tenets of procedural due process counsel against liberally creating claims *by*

implication from the asking of discovery questions. *See generally, Mullane v. Central Hanover Trust*, 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

For these reasons, the district court did not err in granting summary judgment in favor of defendants on plaintiff's unplead *Brady* claim.

III.

Finally, I respectfully dissent from the reversal of the grant of summary judgment in defendants' favor on plaintiff's malicious prosecution claim. In *Swiecicki v. Delgado*, 463 F.3d 489 (6th Cir. 2006), we observed that Ohio requires three necessary elements for a malicious prosecution claim: "(1) malice in instituting (or continuing) the prosecution, (2) lack of probable cause, and (3) termination of the action in favor of the defendant." *Id.* at 503 (citing *Trussell v. General Motors Corp.*, 559 N.E.2d 732, 735 (Ohio 1990)).

In the present case, although the district court erred in considering Harris's confession and the knife, the other evidence connecting Harris to the crime, as discussed above, was sufficient to give rise to probable cause for prosecution. For this reason, plaintiff's malicious prosecution claim fails.

In addition, as the Ohio Court of Appeals held in *Vesey v. Connally*, 175 N.E.2d 876 (Oh.Ct. App. 1960):

> a finding of guilty of a criminal offense by a court having jurisdiction to try and dispose of the case, *even though later and finally reversed by a reviewing court*, raises a conclusive presumption of probable cause and constitutes a complete defense in a later action for malicious prosecution brought by the defendant in the criminal case against the instigator thereof.

Id. at 878 (emphasis added). *See also Tilberry v. McIntyre*, 733 N.E. 2d 636, 641 (Oh. Ct. App. 1999).

Here, by operation of Ohio law, the guilty verdict rendered by the trier of fact constitutes a conclusive presumption of probable cause and a complete defense to plaintiff's malicious prosecution claim. The majority opinion cites no Ohio authority to the contrary. Further, although Judge Moore assumes a *Brady* violation exception to Ohio's "*conclusive* presumption" of probable cause, as detailed above, plaintiff's amended complaint fails to plead facts in support of a *Brady* claim.

IV.

For these reasons, I respectfully concur in part and dissent in part.

APPENDIX 2

2006 WL 1348155 (N.D. Ohio May 16, 2006)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 5:03CV1827

[Filed May 16, 2006]

Anthony Harris,
Plaintiff,

v.

Amanda Spies Bornhorst, et al.,
Defendants.

MEMORANDUM OF OPINION AND ORDER

JOHN R. ADAMS, District Judge.

This action is before the Court upon the Motion for Summary Judgment of defendants Amanda Spies and County of Tuscarawas, Ohio (Doc. 156-1). The Court has reviewed the memorandum in support, memorandum in opposition (Doc. 172), and reply memorandum (Doc. 184) and has considered the entire

record in this matter. For the reasons set forth below, the Court will grant the motion.

I.

Five year old Devan Duniver was brutally murdered. On June 27, 1998, she disappeared from her home in New Philadelphia, Ohio. Plaintiff Anthony Harris, who was Devan's neighbor, was the first person seen coming from the area where Devan's body was discovered. Her body was found in a wooded area behind her home the next day. Plaintiff, an African-American, was 12 years old at the time. The Harris family was one of only a few African-American families in the area where they lived. From the outset, Anthony Harris was one of the persons of interest for this murder. The day after Devan was found dead, the plaintiff told police that "she was a rude, nasty little girl who would eat in front of him." Urban Deposition (Doc. 165) at 253. The New Philadelphia Police learned during their investigation that the plaintiff had threatened to kill Devan. Plaintiff initially provided the police with inconsistent statements regarding whether he was in the area where Devan's body was discovered near the suspected time of her death. Plaintiff, however, later admitted that he was in that area at that time.

With this knowledge, Ms. Spies (the Chief Prosecutor for Tuscarawas County) suggested that the police give the juvenile suspects, including the plaintiff, a computerized voice stress analyzer test to help determine their degrees of candor. Ms. Spies was not involved in acquiring consent for the plaintiff or in performing the test; nor was she even present during the interview.

On July 15, 1998, the police went to the Harris residence and asked that the plaintiff submit to the voice stress test. Plaintiff and his mother, Cynthia Harris, consented to the test. Ms. Harris drove her son to the New Philadelphia police station for the voice stress analyzer test knowing that the police were having trouble eliminating him as a suspect. Plaintiff and his mother signed a pre-printed Consent to Computerized Voice Stress Analyzer Examination (Truth Verification) form. *See* Doc. 156-3. Captain Jeffrey Urban[1] led the investigation because the murder took place in his jurisdiction. Since Captain Urban was not familiar with the voice stress analyzer test, Chief Thomas Vaughn of the Millersburg Police Department was called in to implement the test. Ms. Spies had never met nor spoken to Chief Vaughn until after Harris confessed to Devan's murder. She did not know that Chief Vaughn had training in the confrontational, aggressive "Reid" or "Glen Foster" interrogation methods. Ms. Spies was aware, however, that Chief Vaughn *Mirandized* the plaintiff.

Unbeknownst to Ms. Spies, instead of performing the voice stress test, Chief Vaughn began interrogating the plaintiff. With his mother present and watching-but unable to hear the recorded interrogation from an adjoining room at the police station, the plaintiff confessed to the police that he had murdered his five year old neighbor, Devan Duniver. Chief Vaughn insinuated during the interrogation that the plaintiff may have been angry with Devan because Anthony is

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[1] Jeffrey Urban became Chief of the New Philadelphia Police Department in 2002.

black. He told the plaintiff, "a lot of African Americans got a lot of hate built up over the years and it's because of what we did to you, you know. It wasn't me that did it but it was my forefathers, and it wasn't a nice thing and there's people in this world that are racist." Complaint (Doc. 1, Ex. A) at 275. Contemporaneously, on the other side of the one-way mirror, Captain Urban told Cynthia Harris, "there's so many issues ... in regard to you know, blacks being angry how they've been treated by whites and that there are a lot of angry black men out there."Amended Complaint (Doc. 70) at ¶ 93; Cynthia Harris Deposition (Doc. 176, Ex. E) at 205-206.

When asked what Devan did to make him so mad, the plaintiff said that "she was being a pain in the ass" and "hit me with a brick." Harris Deposition (Doc. 159) at 198-99. The plaintiff provided details during the interview that led those involved to suspect that he was responsible for Devan's death. *See* Transcript of Proceedings in the Juvenile Court (Doc. 187, Ex. 9, Binder 1) at 259-60, 279-80, and 291-93. After the plaintiff confessed, Ms. Spies was called to the police station and informed that Anthony Harris had confessed to the murder. Captain Urban decided to arrest the plaintiff. When Ms. Spies learned that the plaintiff had confessed to the crime on tape, she initiated criminal proceedings against him by filing a criminal complaint on July 16, 1998, alleging that he murdered Devan.

A trial judge subsequently conducted a probable cause hearing, heard evidence tested by cross-examination, and determined that probable cause existed to arrest and prosecute the plaintiff for

murder. *See* Transcript of Proceedings in the Juvenile Court (Doc. 187, Ex. 6) at 22. Plaintiff entered a denial to the charge and filed motions to suppress. The Tuscarawas County, Ohio Juvenile Court partially granted the motions. The juvenile court, however, denied the plaintiff's motion to suppress statements he made to Chief Vaughn, during the questioning on July 15, 1998. The court found that the plaintiff was not in custody at the time he made incriminating statements and that his confession complied with constitutional requirements. *See* Judgment Entry filed in the Juvenile Court (Doc. 187, Ex. 10). Accordingly, the plaintiff's confession was presented at the adjudicatory hearing that began in February 1999, along with other circumstantial evidence. The six-week-long trial was broadcast on local radio and was the subject of intense media scrutiny. The juvenile court found the state had proven, beyond a reasonable doubt, that the plaintiff had purposely caused Devan's death. Plaintiff was adjudicated delinquent by reason of murder and committed to the Department of Youth Services until he reached age 21. *See* Judgment Entry filed in the Juvenile Court (Doc. 187, Ex. 7).

A state court of appeals later found that the juvenile court erred when it denied the plaintiff's motion to suppress statements he made during a coercive, custodial interrogation on July 15, 1998, because the statements were elicited in violation of his constitutional right against self-incrimination. *In re Harris,* No.1999AP030013, 2000 WL 748087, at *6 (Ohio Ct. App. June 7, 2000). At a press conference the next day, in response to a question and with knowledge that an appeal to the Ohio Supreme Court would be filed, Ms. Spies stated that "in my heart and

in my gut, I feel that Anthony Harris is responsible for the murder of Devan Duniver."Spies Deposition (Doc. 175, Ex. B) at 44-45; 180-81.[2] Ms. Spies subsequently did file a Notice of Appeal. Upon consideration of the jurisdictional question, the Ohio Supreme Court declined jurisdiction and dismissed the appeal. *In re Harris,* 90 Ohio St.3d 1428 (2000). One Justice dissented. Thereafter, the charges were dismissed against the plaintiff. Anthony Harris spent approximately two years in the custody of the State of Ohio.

The Devan Duniver murder investigation remains ongoing and law enforcement still considers the plaintiff a strong suspect in the murder. Captain Urban's testimony also reveals that, at least up to the time of his deposition on December 15, 2004, the plaintiff continued to be the only suspect in the murder investigation. Doc. 165 at 10-11. The police investigation file remains open. Ms. Spies testified that she was aware that the plaintiff was still under investigation by the New Philadelphia Police Department. She had been informed of this through Captain Urban as well as through Captain Urban's request to submit DNA evidence found on the plaintiff's shirt and shorts for further testing.

Subsequent to filing the case at bar and after being rejected by the U.S. Army, the plaintiff applied for service in the U.S. Marine Corps. Upon application to

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[2] Copies of a television broadcast and newspaper article reporting on the news conference are attached as Exhibits 1 and 2 to the Affidavit of Guenther K. Fanter (Doc. 180) at Ex. BB.

the Marine Corps, on January 28, 2004, the plaintiff signed a Police Record Check release form. *See* Doc. 156-5. This form, along with an express promise of confidentiality, provided Ms. Spies with authorization to provide all information regarding the plaintiff's police or juvenile record, including minor traffic violations and whether the plaintiff was then "undergoing court action of any kind." *Id.* at Nos. 12 and 13.Ms. Spies informed the Marines that the plaintiff would "always" be a suspect in the murder of Devan Duniver "until he is cleared." Doc. 175, Ex. B at 181-83; Baker Deposition (Doc. 163) at 27; Brahen Deposition (Doc. 160) at 32. She also told Master Sergeant Baker in a brief telephone conversation, "do you know [Anthony Harris is] trying to sue us." Doc. 163 at 22.

The Marine Corps recruiters were aware of the plaintiff's later-reversed conviction for the murder of Devan, as well as this lawsuit, prior to speaking to Ms. Spies. According to the Marines, the plaintiff's application was denied based upon the recruiter's determination that plaintiff's conviction was reversed on a technicality. As such, the Marines did not want to risk jeopardizing the image of the Corps.

II.

On August 29, 2003, the plaintiff, by and through his mother, filed a Complaint (Doc. 1) against seven defendants: Ms. Spies; Tuscarawas County; three police officers; and two of their respective political subdivisions. On March 29, 2004, the Court entered a marginal entry order (Doc. 39) that substituted Anthony Harris as plaintiff in the place and stead of

his mother. Thereafter, with leave of Court, the plaintiff filed an Amended C mplaint (Doc. 70) which named the same defendants and added new allegations against Ms. Spies and Tuscarawas County based on alleged conduct of Ms. Spies subsequent to the filing of the original complaint.

After hearings on the Motion for Judgment on the Pleadings of Ms. Spies and Tuscarawas County (Doc. 36), the claims against these defendants were narrowed. *See* Order and Decision (Doc. 81). As a result of a settlement conference conducted by the Court on February 15, 2005, the plaintiff settled his claims with five of the seven named defendants. *See* Stipulation and Order of Dismissal (Doc. 155). The only defendants remaining are Ms. Spies and Tuscarawas County.[3] All that remains are limited claims under 42 U.S.C. § 1983, a42 U.S.C. § 1985 claim, and claims for aiding and abetting, malicious prosecution, defamation, and tortious interference with a prospective business relationship under Ohio law.

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[3] Following the settlement, the Court discussed with the plaintiff and the remaining defendants the status of discovery and what, if any, discovery remained to be completed prior to the filing of dispositive motions. The Court ordered that no other discovery, including depositions discussed following the settlement conference, should be conducted until the Court has issued a decision on the within motion for summary judgment. *See* Order (Doc. 130).

III.

Summary judgment is appropriately granted when ... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

Fed.R.Civ.P. 56(c). *See also Johnson v. Karnes,* 398 F.3d 868, 873 (6th Cir. 2005).

The moving party is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The moving party must "show that the non-moving party has failed to establish an essential element of his case upon which he would bear the ultimate burden of proof at trial." *Guarino v. Brookfield Tp. Trustees,* 980 F.2d 399, 403 (6th Cir. 1992). Once the movant makes a properly supported motion, the burden shifts to the non-moving party to demonstrate the existence of a genuine dispute. Under Fed.R.Civ.P. 56(e),

> ... an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial (emphasis added).

The non-moving party must, in order to defeat the motion, "show that there is doubt as to the material facts and that the record, taken as a whole, does not lead to a judgment for the movant." *Guarino*, 980 F.2d at 403. In reviewing the motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party when deciding whether a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Assn., Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990).

The United States Supreme Court, in deciding *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), stated that in order for a motion for summary judgment to be granted, there must be no genuine issue of material fact. *Id.* at 248. A fact is "material" only if its resolution will affect the outcome of the lawsuit. In determining whether a factual issue is "genuine" the Court must decide whether the evidence is such that reasonable jurors could find that the non-moving party is entitled to a verdict. *Id.* To withstand summary judgment, the non-movant must show sufficient evidence to create a genuine issue of material fact. *Klepper v. First Am. Bank*, 916 F.2d 337, 342 (6th Cir. 1990). The existence of a mere scintilla of evidence in support of the non-moving party's position ordinarily will not be sufficient to defeat a motion for summary judgment. *Id.* at 252.

IV.

Ms. Spies and Tuscarawas County move the Court for summary judgment because:

1. Ms. Spies, acting in her role as prosecutor, is entitled to absolute immunity from Plaintiff's claims;

2. Ms. Spies, prior to acting in her role as prosecutor, is entitled to qualified immunity from Plaintiff's claims; and

3. The record is devoid of evidence to support the claims against these Defendants.

A. Ms. Spies is Immune from Liability for Plaintiff's § 1983 Claims

The § 1983 allegations that remain against Ms. Spies involve only claims related to her role in the improper custodial interrogation, (Doc. 70, ¶ 130(d)) and her role in the arrest and charging of the plaintiff (*Id.*, ¶ 130(e-g)). Liability under § 1983 is limited by two recognized exceptions: qualified immunity and absolute immunity. Well-established law clearly affirms that Ms. Spies is immune from civil liability for these claims, even if they are true.

1. Functioning in Her Role as a Prosecutor, Ms. Spies is Entitled to Absolute Immunity for Her Role in the Prosecution of the Plaintiff

The Court begins its analysis with the rule that "in determining immunity, we examine 'the nature of the function performed, not the identity of the actor who

performed it.'" *Kalina v. Fletcher,* 522 U.S. 118, 127 (1997) (quoting *Forrester v. White,* 484 U.S. 219, 229 (1988)). In *Kalina,* the Court found that as to the prosecutor's actions in preparing and filing two unsworn documents, the prosecutor was acting as an advocate of the state in the judicial process; therefore, her actions were protected by absolute immunity. *Id.* at 129. It is well-established that a prosecuting attorney acting within the scope of her duties in both initiating and pursuing a criminal prosecution is absolutely immune from a civil suit for damages under § 1983 for any allegations of deprivation of the accused's constitutional rights. *Imbler v. Pachtman,* 424 U.S. 409, 418 (1976); *Burns v. Reed,* 500 U.S. 478 (1991); *Buckley v. Fitzsimmons,* 509 U.S. 259 (1993); *Jones v. Shankland,* 800 F.2d 77 (6th Cir. 1986). Prosecutors are absolutely immune from suit when the conduct complained of relates to their role as advocates for the state in the judicial process. *E.g., Buckley,* 509 U.S. at 273; *Burns,* 500 U.S. at 485-86; *Higgason v. Stephens,* 288 F.3d 868, 877-78 (6th Cir. 2002). "As for judges themselves, prosecutors have historically enjoyed the broadest range of absolute immunity for their actions in the course of criminal prosecutions-broader indeed than that granted police officers or testifying witnesses." *Gregory v. City of Louisville,* 444 F.3d 725, 2006 WL 909935, at *11 (6th Cir. April 11, 2006).

"[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question ." *Burns,* 500 U.S. at 486. Plaintiff argues that Ms. Spies has not met her burden of showing that her decision to arrest the plaintiff is protected by absolute immunity. The Court agrees. Ms.

Spies maintains that the decision to arrest the plaintiff was made by Captain Urban. Ms. Spies testified as follows:

> Q. Who makes the decision whether or not to prepare a *charge?*
>
> A. Either myself or the assistant who receives the report.
>
> Q. Who made the decision to *charge* Anthony Harris with murder?
>
> A. I made the decision *after* Chief Urban determined there was probable cause to *arrest* him, and then provided me with a report. (Emphasis added.)

Doc. 175, Ex. B at 366. Furthermore, she testified: I am telling you that Captain Urban made a probable cause determination that Anthony Harris should be arrested for the murder of Devan Duniver; and therefore, *based upon my subsequent conversations with him,* a complaint was prepared for him to sign and file in juvenile court. (Emphasis added.)

Id. at 372-73. But, Ms. Spies also testified:

> A. There was a decision made by Jeff Urban to arrest Anthony, and at that point I returned to my office.

* * *

Q. Did Captain Urban ask you for your input on whether Anthony should be arrested at that point?

A. I don't believe that he did. As I sit here right now, I don't have an independent recollection that he did.

Q. Did you offer any input on that subject?

A. Not that I recall as I sit here.

Id. at 653-54.Finally, she testified:

Q. So I think what you're saying to me, and you can correct me if I'm wrong, that you simply don't recall one way or the other, whether on July 15, 1998, you made the decision to have Anthony Harris arrested for murder and put into jail; is that correct?

A. I don't-

MR. CLEARY: Objection.

A. I don't recall making that decision one way or the other.

Id. at 1008-1009.Ms. Spies also relies on the following testimony of Captain Urban on direct examination during the proceedings in the juvenile court:

Q. Where did Anthony go from the police station?

A. Anthony went to the Tuscarawas County Attention Center.

Q. And what was the purpose of taking him there, please?

A. To hold him for charges the following day and for his own safety.

Q. When was the decision made that you were going to keep him in detention?

A. After I had talked to the county prosecutor.

Q. And this was after the questioning of Anthony?

A. Yes.

Q. And did you at any time, prior to making that decision, tell Anthony he was going to be held?

A. No.

Q. Did you tell Mrs. Harris, prior to making that decision, that he may be held?

A. No.

(Doc. 187, Ex. 9, Binder 1) at 181.

Plaintiff cites to the depositions of Captain Urban and Chief Vaughn in support of his contention that the

decision to arrest him was made by Ms. Spies. Captain Urban testified as follows:

> Q. What did Miss Bornhorst say to you when she was done listening to the tape?
>
> A. She told me to take him to the attention center.
>
> Q. Did you have any conversation about whether that was an appropriate step?
>
> A. No.
>
> Q. So-
>
> A. I don't think so.
>
> Q. -she directed that you arrest Anthony Harris?

MR. STIEFVATER: Object to the form.

> A. Yes. Yes.

Doc. 165 at 540.

> Q. Notwithstanding your feelings or your position on that point [whether the plaintiff should be arrested on July 15th or at a later time], you arrested Anthony on July 15th?
>
> A. Yes, I did.

Q. And you did that solely because you had been directed to do that by Miss Bornhorst?

A. Yes, sir.

MR. STIEFVATER: Objection.

Id. at 545.Chief Vaughn testified:

Q. Were you present when Anthony was arrested?

A. I wasn't present when he was told that he was going to detention or whatever he was told, no.

Q. Were you present when Captain Urban decided to arrest Anthony?

MR. McLANDRICH: Objection.

A. I don't recall that Captain Urban decided that.

* * *

A. I believe I was walking into the room or back into the room at some point, and there was discussion, I don't remember specifically that he needed to go to the attention center or whatever term they use, and I don't remember now-to me it meant that he wasn't going home with his mother that day.

> And I said why not? And my recollection is Miss Bornhorst said that he was not. Or something to that effect. Then-then I left.

* * *

> A. I heard that she-that-or got the drift that-that Anthony wasn't going to go home with his mother that day and I raised the objection, yes.

Vaughn Deposition (Doc. 176, Ex. D) at 646-48.

Ms. Spies arrived at the police station after the plaintiff confessed to murder. Captain Urban arrested Anthony Harris. Only after probable cause to arrest existed, did Ms. Spies decide to file charges. Viewing the evidence in a light most favorable to the plaintiff, the Court holds that absolute immunity attaches only for the role of Ms. Spies in the prosecution of the plaintiff, not for her function in the arrest, because it can not be gleaned from the record whether the conduct objected to was performed by Ms. Spies in an advocacy or an investigatory role. *Burns,* 500 U.S. at 496 (prosecutors are not entitled to absolute immunity for the act of giving legal advice to the police); *see also Prince v. Hicks,* 198 F.3d 607, 614 (plaintiff's complaint sufficed to avoid a Rule 12(b)(6) dismissal on absolute immunity grounds).

2. Ms. Spies is Otherwise Entitled to Qualified Immunity for Her Role in the Arrest of the Plaintiff

Ms. Spies argues that even were she not to be entitled to absolute immunity for some of her conduct, she merits at least qualified immunity to shield her from liability for it. Qualified immunity applies to law enforcement officials, including prosecutors, when they perform investigative functions. *Buckley,* 509 U.S. at 273 ("When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'")

Qualified immunity protects officials from liability when a reasonable official in the defendant's position would not have understood his or her actions to violate a person's constitutional rights. *Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982). Under the doctrine of qualified immunity, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

The Court of Appeals for the Sixth Circuit has established a three-step test for evaluating qualified immunity defenses. In *Feathers v. Aey,* 319 F.3d 843, 848 (6th Cir. 2003), the Sixth Circuit stated the three-part test as follows:

> Qualified immunity involves a three-step inquiry. First, we determine whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred. Second, we consider whether the violation involved a clearly established constitutional right of which a reasonable person would have known. Third, we determine whether the plaintiff has offered sufficient evidence "to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Williams v. Mehra,* 186 F.3d 685, 691 (6th Cir. 1999) (en banc) (citing *Dickerson v. McClellan,* 101 F.3d 1151, 1158 (6th Cir. 1996)); *see also Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

If the plaintiff fails to establish any one of these elements, qualified immunity must be granted. *Radvansky v. City of Olmsted Falls,* 395 F.3d 291, 302 (6th Cir. 2005).[4]

Even if Ms. Spies did make the decision to arrest the plaintiff, the Court holds that decision would be protected by the doctrine of qualified immunity.

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[4] The Supreme Court announced a two-step inquiry for evaluating qualified immunity claims in *Saucier.* The Sixth Circuit explained in *Sample v. Bailey,* 409 F.3d 689 (6th Cir. 2005), however, that its "three-step approach correctly encompasses the Supreme Court's approach to qualified immunity claims and serves to ensure government officials the proper protection from civil suit under the law." *Id.* at 696 n. 3.

Plaintiff alleges that he was arrested without probable cause. Doc. 70, ¶ 130(e). As such, qualified immunity applies if a reasonable person could have believed that probable cause existed to arrest the plaintiff. *See Hunter v. Bryant,* 502 U.S. 224, 227 (1991) (per curiam). At the time the plaintiff was arrested and charged, there was a reasonable basis to conclude that probable cause existed.

Plaintiff repeatedly cites this Court's Order and Decision (Doc. 81) on the Motion for Judgment on the Pleadings of Ms. Spies and Tuscarawas County (Doc. 36) as if this Court's acceptance of the facts alleged as true, as it is obligated to do when considering a motion pursuant to Rule 12, somehow provides the plaintiff with the necessary factual support to survive summary judgment. It does not. *See Wyoming v. Oklahoma,* 502 U.S. 437, 464 (1992) (Scalia, J, dissenting) (when a district court denies a motion for judgment on the pleadings, it need feel no compunction of consistency to deny a subsequently filed motion for summary judgment).

Plaintiff contends that "[e]xcept for the tape recording, there was *no* evidence of Anthony's guilt" at the time he was arrested. Doc. 172 at 23. To the contrary, there is ample evidence to support a reasonable conclusion by Ms. Spies at that time that there was a probability the plaintiff was responsible for the murder of Devan Duniver. He had confessed that he murdered Devan; and there was also substantial evidence to corroborate that confession. Devan's aunt knew about and informed authorities about the prior threat the plaintiff had made on Devan's life. Doc. 187, Ex. 6 at 5. It was corroborated

that the plaintiff was walking alone coming home from a friend's house around the time Devan disappeared. *Id.* at 6. In fact, he had been seen entering the wooded area where Devan's body was found just near the time that Devan was last seen, heading for that wooded area. *Id.* Suspiciously, the plaintiff gave the police at least five different versions about where he was and the route he took home before finally admitting the truth. *Id.* at 9. Anthony Harris admitted to a prior act of violence against Devan. *Id.* at 16. Furthermore, the plaintiff confessed that the murder weapon was a knife owned by a friend of his. A knife was recovered and, at the time probable cause was determined, was awaiting transportation to the lab for analysis. *Id.* at 18.

The case of *Greene v. Reeves*, 80 F.3d 1101 (6th Cir. 1996), lends support to the Court's conclusion that Ms. Spies is entitled to qualified immunity for her role in the arrest of the plaintiff. In finding that qualified immunity shielded the officials from liability, the Sixth Circuit in *Greene* noted that "a postal worker, a prohibitive mail specialist, a ... detective, a commonwealth prosecutor, the judge ..., and a grand jury were sufficiently concerned over the conduct ... to take action." *Id.* at 1107. The Sixth Circuit thought it unlikely that all such officials were not only wrong but also unreasonable in their beliefs. *Id.* Under the circumstances of the case at bar, the Court determines that Ms. Spies did not exceed the "broad range of reasonable professional judgment" accorded her under the doctrine of qualified immunity. *Id.* That the state court of appeals later declared the statements from the plaintiff on July 15, 1998 were elicited in violation of his Fifth Amendment privilege against self-incrimination matters not because officials are

"'entitled to qualified immunity [when] their decision was *reasonable,* even if mistaken.'" *Pray v. City of Sandusky,* 49 F.3d 1154, 1158 (6th Cir. 1995) (alteration and emphasis in original) (quoting *Castro v. United States,* 34 F.3d 106, 112 (2d Cir. 1994)); *see Anderson v. Creighton,* 483 U.S. 635, 641 (1987) (noting that law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity); *see also Armstrong v. City of Melvindale,* 432 F.3d 695, 702 (6th Cir. 2006) (reversing the district court's denial of defendants' motion for summary judgment on qualified immunity grounds).

3. Ms. Spies is Entitled to Qualified Immunity for Her Role in the Plaintiff's Interrogation Because the Plaintiff Cannot Establish That the Interrogation was so Clearly in Violation of Established Law

Plaintiff argues that Ms. Spies assigned herself to and was active in the investigation of the murder of Devan Duniver. The Court previously concluded that Ms. Spies is entitled to qualified immunity for the plaintiff's Fourth Amendment claims arising from her preparation on July 1, 1998, of a search warrant application and supporting affidavit that included false facts and her legal advice to the police that they should obtain the consent of Ms. Harris to search her home in lieu of executing the warrant. *See* Doc. 81 at 50-51. Plaintiff has not, however, presented any factual evidence to support his assertion that Ms. Spies was responsible for the subsequently identified constitutional violations that occurred during the interrogation of him. A plaintiff cannot avoid summary

judgment on the basis of generalizations set forth in opposition to a motion for judgment on the pleadings because, at this stage of the litigation, a nonmoving party cannot rest on "mere allegations" to counter a properly supported motion for summary judgment, but must set forth "specific facts" through affidavits or other evidence. Fed.R.Civ.P. 56(e). *See Liberty Lobby, Inc.*, 477 U.S. at 248-49.

a. Plaintiff Cannot Establish That the Interrogation of the Plaintiff was so Clearly in Violation of Established Law Because Even the Ohio Courts Reviewing this Issue Disagreed

Defendants focus on the second step of the three-step qualified immunity analysis in arguing that the plaintiff has failed to establish that the interrogation of him violated clearly established law. "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

The constitutionality of the statements the plaintiff made to Chief Vaughn, during the questioning on July 15, 1998, was tested by the plaintiff just prior to the beginning of the adjudicatory hearing during a hearing on plaintiff's motions to suppress. The juvenile court ultimately found the confession to be constitutionally sound and admissible at trial. Therefore, even if the plaintiff could prove any participation by Ms. Spies in the interrogation of him, the constitutional rights that were violated could not have been clearly established. *See Murray v. Earle*, 405 F.3d 278, 291, 289-93 (5th Cir.) (discussing the "breaks the chain of causation"

principle), *cert. denied,*--- U.S. ----, 126 S.Ct. 749 (2005).

b. Plaintiff Cannot Establish That Ms. Spies or Tuscarawas County Had Any Part in the Actions That Were Later Determined to Be Constitutionally Infirm

Plaintiff's confession established the existence of probable cause and a complaint followed. Plaintiff has not produced evidence that demonstrates that Ms. Spies was engaged in any constitutionally questionable conduct. Indeed, every act for which the plaintiff's confession was later suppressed was attributable to the actions of the police outside of her presence and without her knowledge. In fact, a review of the opinion of the state appellate court in *In re Harris, supra,* confirms that not even a single act of Ms. Spies was cited.

B. Tuscarawas County Did Not Violate Plaintiff's Brady Rights

Plaintiff argues that Tuscarawas County violated the disclosure requirements under *Brady v. Maryland,* 373 U.S. 83 (1963). *See* Doc. 172 at 18-21. But this claim was never properly raised because the plaintiff did not seek to amend the complaint again and asserted this new cause of action for violation of his *Brady* rights for the first time in response to the within motion for summary judgment. *See Naples v. Lowellville Police Dept.,* 125 Fed. Appx. 636, 644 (6th Cir. 2005).

Plaintiff contends that Ms. Spies knew that the plaintiff's defense in the juvenile court proceedings was that someone else murdered Devan and that one suspect was Jamie Redmond.[5] Assuming *arguendo* that the Amended Complaint (Doc. 70) sets forth a claim for violation of the plaintiff's *Brady* rights, the Court finds that there is no *Brady* violation because the claim is factually unsupported. Plaintiff was aware of the essential facts that would enable him to take advantage of the exculpatory evidence regarding Redmond. Furthermore, a reasonable defendant would have looked for the records from Children's Services in Columbus that showed that Redmond had physically beaten Devan around the time he abducted her. *See Spirko v. Mitchell,* 368 F.3d 603, 610-11 (6th Cir.2004).

C. Plaintiff's § 1985 Claim Fails Because the Record is Devoid of any Evidence of Race-Based Animus by Either Ms. Spies or Tuscarawas County

Plaintiff also seeks damages under 42 U.S.C. § 1985 for the defendants' alleged conspiracy to deprive him of his constitutional rights. The Amended Complaint describes the existence of an agreement between Ms. Spies and the three police officers to deprive Anthony Harris of several constitutional rights, including the right to equal protection of the law. To state a claim under § 1985(3), a plaintiff must allege: "(1) a conspiracy; (2) for the purpose of

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[5] A drug-addicted convicted felon living in Columbus, who was in a relationship with Devan's mother. He was under court order to stay away from Devan since abducting her in 1997.

depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *United Bhd. of C & J v. Scott,* 463 U.S. 825, 828-29 (1983). The acts which are alleged to have deprived the plaintiff of equal protection must be the result of class-based discrimination. *See Newell v. Brown,* 981 F.2d 880, 886 (6th Cir. 1992).

Plaintiff states at page 30 of Doc. 172 that "Anthony requests, pursuant to Fed.R.Civ.P. 56(f), that this Court defer ruling on Anthony's conspiracy claim under § 1985 until discovery can be completed." Under Rule 56(f), a court may delay ruling on a summary judgment motion or refuse the motion altogether if it finds that the party opposing summary judgment has established a need for additional discovery. The Sixth Circuit has interpreted Rule 56(f) to require that a party opposing a summary judgment motion must "file an affidavit that 'indicate[s] to the district court its need for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information.'" *Gettings v. Building Laborers Local 310 Fringe Benefits Fund,* 349 F.3d 300, 305 (6th Cir. 2003) (quoting *Cacevic v. City of Hazel Park,* 226 F.3d 483, 488 (6th Cir. 2000)). The Court finds that the plaintiff has failed to comply with the requirements of Rule 56(f).*United States v. Dairy Farmers of America, Inc.,* 426 F.3d 850, 863 (6th Cir. 2005).

In addition to the months of recorded testimony in the juvenile court proceedings, extensive discovery

already has been completed in this case, including numerous and extensive depositions. Plaintiff, however, does not demonstrate any fact of record to establish that he was a victim of a conspiracy against him predicated on some "class-based animus." Simply stated, there is no factual evidence to support a claim of racial discrimination. Since the plaintiff has not established that the actions of Ms. Spies and Tuscarawas County were motivated by a racial or other class-based invidiously discriminatory animus, his Second Claim for Relief in the Amended Complaint (Doc. 70) brought pursuant to § 1985 also fails.

D. Plaintiff Cannot Establish His Claim for First Amendment Retaliation

Plaintiff alleges in his Sixth Claim for Relief that Ms. Spies and Tuscarawas County violated his First Amendment right to petition the government for redress of a grievance. Plaintiff alleges that Ms. Spies, acting for the County, violated these rights when she responded to the inquiry of the Marine Corps by stating that the plaintiff continued to be a suspect and would always be a suspect because there were no other suspects. Plaintiff asserts that this statement was made to punish him for exercising his right of access to the courts and to deter him from continuing to litigate the case at bar.

The Sixth Circuit has held that a § 1983 claim can be predicated upon a state official's retaliation against an individual for exercising his First Amendment rights. *Thaddeus-X v. Blatter,* 175 F.3d 378, 394-95 (6th Cir.1999) (en banc). "A retaliation claim essentially entails three elements: (1) the plaintiff

engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two-that is, the adverse action was motivated at least in part by the plaintiff's protected conduct." *Id.* at 394.

Plaintiff is unable to sustain his burden as to the second and third prongs of the three-part test for evaluating retaliation claims.

1. The Record is Clear That the Statement of Ms. Spies' was not the Cause of the Rejection of the Plaintiff by the U.S. Marine Corps Nor was Her Statement Sufficiently Threatening to Quell the Litigious Urges of a Person of Objectively Ordinary Resolve

According to the Marine Corps, the plaintiff's application was denied based upon the determination that his conviction was reversed on a technicality. Master Sergeant Baker testified as follows:

> And the second reason, the biggest reason why he wouldn't understand is that he was off on a technicality because his Miranda rights were not read to him, I guess, in front of an adult or something like that. And that was the biggest reason why that the Marine Corps said no was because of that.

Doc. 163 at 27. Captain Gonzalez testified:

Q. What was the information that was given to you in that first conversation then, so that we know what Anthony Harris told Baker that was told to you, the initial information? Do you have a recollection of that?

A. In a nutshell, it was he was convicted of murder, but got released because of the technicality.

Q. What was your essential response to Baker at that time? Did you want to pursue that individual or not?

A. No, I did not.

Gonzalez Deposition (Doc. 162) at 25. In the eyes of the Marines, the suppression of the plaintiff's confession by the state appellate court did not negate its existence. As such, the plaintiff was not viewed as a suitable candidate for service in the Marine Corps. The U.S. Army reached the same conclusion without the benefit of Ms. Spies' insight into the matter. The information provided by Ms. Spies (in response to a government inquiry), was truthful. Anthony Harris is still a suspect in the murder of Devan Duniver.

The statement of Ms. Spies did not stop the plaintiff from proceeding with this civil suit. There is absolutely no evidence that her conversation with the Marine Corps recruiter had any effect on the conduct of the plaintiff whatsoever, let alone that it caused him to abandon the case at bar. There is nothing in the record to suggest that Ms. Spies knew or had reason to know that her statement to a Marine Corps recruiter

conducting a government investigation of the plaintiff would eventually become public, non-confidential information.

This case is similar to the case of *Neier v. City of Pemberville,* No. 99-3104, 2000 WL 32008 (6th Cir. Jan. 4, 2000), wherein the court found that the defendant's actions would not "chill a person of ordinary firmness from exercising his or her First Amendment rights, and it clearly had no such effect on plaintiff. After [the defendant]'s alleged threat, plaintiff maintained his claims." *Id.* at *4. Similarly, the plaintiff has maintained his claims in the case at bar.

2. Plaintiff is Still a Suspect-the Fact That Ms. Spies Has Said so Both Before and after this Lawsuit was Filed Proves That There is No Connection Between this Lawsuit and Her Statement

The statement of Ms. Spies to the Marine Corps recruiter was motivated by the strength of her belief and her desire to provide accurate information, rather than any attempt to intimidate the plaintiff into abandoning the case at bar.

E. The Record Does Not Support the Plaintiff's Claim for Aiding and Abetting Against Ms. Spies and Tuscarawas County

Plaintiff alleges in his Third Claim for Relief in the Amended Complaint (Doc. 70) that each of the defendants had actual knowledge of a scheme to violate his constitutional rights and that the

defendants provided substantial assistance to each other in perpetrating these alleged violations. Plaintiff further states that each of the defendants had actual knowledge that the plaintiff's constitutional rights were being violated at the time each defendant provided substantial assistance to the other defendants.

Proof of two elements is required to establish a claim for civil aiding and abetting. A plaintiff must prove that the person charged with the tort (1) knew that the primary party's conduct constituted a breach of duty and (2) gave substantial assistance or encouragement to the primary party in carrying out the breach. *Aetna Cas. & Sur. Co. v. Leahey Constr. Co., Inc.*, 219 F.3d 519, 533 (6th Cir. 2000). Aiding and abetting liability requires proof that a defendant "associated himself with the venture, participated in it as something he wished to bring about, and sought by his actions to make it succeed."*Wilson v. Town of Mendon*, 294 F.3d 1, 15 (1st Cir. 2002) (quoting *United States v. Garcia-Rosa*, 876 F.2d 209, 217 (1st Cir. 1989)). Mere presence does not establish the existence of liability for aiding and abetting. *Id.*

Based upon the indisputable facts in the record, it is clear that Ms. Spies had no knowledge that either Chief Vaughn or Captain Urban's conduct was a breach of duty; and that she provided neither substantial assistance nor encouragement to Urban or Vaughn in carrying out their allegedly tortious acts. As such, this claim fails as a matter of law.

F. Plaintiff's Claim of Malicious Prosecution Under Ohio Law Fails Against Tuscarawas County[6]

In Ohio, the elements of malicious criminal prosecution are: (1) malicious institution of prior proceedings; (2) lack of probable cause; and (3) termination of the prior proceedings in the plaintiff's favor. *Trussell v. Gen. Motors Corp.*, 53 Ohio St.3d 142, 145 (1990). Tuscarawas County can obtain summary judgment by establishing probable cause for the plaintiff's arrest. This claim will be dismissed because the plaintiff's confession alone provided probable cause to initiate and pursue the criminal charge against him. The mere fact that charges are subsequently dropped against a defendant is of no consequence in the determination of probable cause. *Ireland v. Tunis*, 113 F.3d 1435, 1449-50 (6th Cir. 1997).

As previously stated, there was substantial evidence to corroborate the plaintiff's confession. Devan's aunt knew about and informed authorities about the prior threat the plaintiff had made on Devan's life. Doc. 187, Ex. 6 at 5. It was corroborated that the plaintiff was walking alone coming home from a friend's house around the time Devan disappeared. *Id.* at 6. In fact, he had been seen entering the wooded area where Devan's body was found just near the time that Devan was last seen, heading for that wooded area. *Id.* Suspiciously, the plaintiff gave the police at least five different versions about where he was and

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[6] The Court previously dismissed the claim for malicious prosecution against Ms. Spies because she is absolutely immune pursuant to state law. *See* Doc. 81 at 61-62.

the route he took home before finally admitting the truth. *Id.* at 9. Finally, Anthony Harris admitted to previously knocking Devan down. *Id.* at 16.

Plaintiff correctly states that although malice is the "ultimate issue," *Criss v. Springfield Twp.*, 56 Ohio St.3d 82, 86 (1990), this particular state of mind can be inferred from a lack of probable cause. Plaintiff, however, can point to no direct evidence supporting the first element of a malicious criminal prosecution.

G. The Statements of Opinion and Truth by Ms. Spies are Not Defamatory

The First Amendment to the United States Constitution[7] protects expressions of opinion and generally grants opinions absolute immunity from a defamation claim. *Scott v. The News-Herald*, 25 Ohio St.3d 243, 250 (1986). Furthermore, truth is always a defense in any action for defamation in Ohio.[8] *Shiflet*

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[7] Although the Ohio Constitution provides "separate and independent" protection of opinion from that provided by the U.S. Constitution, the Ohio Supreme Court has found that the disparity between the two "may be considered a distinction without a difference...." *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 281 (1995).

[8] Ohio Rev. Code § 2739.02 concerns the defense of truth in actions for libel or slander, and states:

> In an action for a libel or a slander, the defendant may allege and prove the truth of the matter charged as defamatory. *Proof of the truth thereof shall be a complete defense.* In all such actions any

v. Thomson Newspapers, Inc., 69 Ohio St.2d 179, 183 (1982).

1. "In My Heart and in My Gut, I Feel that Anthony Harris Is Responsible for the Murder of Devan Duniver" is a Statement of Opinion

The determination as to whether an alleged defamatory statement is an opinion or fact is a question of law for this Court to resolve. *Scott,* 25 Ohio St.3d at 250. The Court must examine the statement under the totality of the circumstances when determining whether it is fact or opinion. *Id.* A court should look at four factors when considering the totality of the circumstances: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the overall broader context in which the statement is made. *Id.*

The specific language used in the case at bar is "in my *heart* and in my *gut,* I *feel* that Anthony Harris is responsible for the murder of Devan Duniver." (Emphasis added.) Ms. Spies argues that this statement, when looking at the specific language, is clearly opinion. She was merely expressing feelings in her heart and in her gut. The Court agrees.

The question of whether Ms. Spies implies that she has first-hand knowledge that substantiates the opinion asserted must be considered in assessing whether the statement is verifiable. *Vail,* 72 Ohio

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mitigating circumstances may be proved to reduce damages. (Emphasis added.)

St.3d at 283. "[W]here the '... statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content.'" *Scott,* 25 Ohio St.3d at 251-52 (quoting *Ollman v. Evans,* 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc). Ms. Spies described her personal feelings within her heart and gut, which are not independently verifiable. Therefore, a reasonable reader or listener would not believe that her statement has specific factual content.

Moreover, the context in which the statement was made diminishes any potential defamatory effect. Ms. Spies made the statement after Anthony Harris (whom she had prosecuted and who was convicted) was released due to the appellate court's finding that the incriminating statements made by the plaintiff should have been suppressed by the juvenile court. Shortly after the plaintiff was released from the Department of Youth Services, and in response to statements in the media, Ms. Spies entertained a press conference. Her statement was made in response to a question prompted by press interest in the case. Based upon the totality of the circumstances, the Court is convinced that the ordinary listener would accept this statement as opinion and not as fact.

2. "Anthony Harris Continues to Be and Always Will Be a Suspect of the Crime Because There Are No Other Suspects" is Truth

Plaintiff cites to the deposition testimony of Captain Urban[9] and declares that he testified that this statement of Ms. Spies is untrue. Doc. 172 at 33, n. 26. A review of the deposition testimony, however, leads the Court to conclude that Captain Urban did not testify that the statement is untrue, rather he testified:

> Q. Do you agree that Anthony Harris will always be a suspect of the murder of Deven Duniver?
>
> A. Not necessarily.
>
> Q. And that's because somebody else might be found to have committed that murder, right?
>
> A. It's possible.
>
> Q. Or there may be some kind of an advance in a DNA test that would prove conclusively that Anthony Harris couldn't have done it?
>
> A. That's correct.
>
> Q. So would you agree with me it's inappropriate and inaccurate to state that Anthony Harris will always be a suspect of the murder of Devan Duniver?
>
> A. In my-

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[9] Doc. 165 at 691-94.

MR. STIEFVATER: Objection.

Q. Go ahead.

A. In my opinion, yes.

Doc. 165 at 694.

In considering the statement at issue, the Court concludes that the truth of the statement negates the alleged defamation claim set forth by the plaintiff. *Strickland v. Tower City Mgt. Corp.*, No. 71839, 1997 WL 793133, at *7 (Ohio Ct.App. Dec. 24, 1997) (When a defendant is able to demonstrate the truth of the allegedly defamatory statement, summary judgment can properly be granted.) Thus, the Court finds that Ms. Spies is entitled to summary judgment on the plaintiff's defamation claim.

H. Plaintiff's Tortious Interference with Prospective Business Relationship Claim Fails for a Number of Reasons

Plaintiff alleges in his Seventh Claim for Relief in the Amended Complaint (Doc. 70) that Ms. Spies tortiously interfered with his prospect of entering the U.S. Marine Corps by informing a recruiter that contacted her that Anthony Harris would "always" and "forever" be a suspect in the murder of Devan Duniver.

As stated by the state court of appeals in *Telxon Corp. v. Smart Media of Delaware, Inc.*, Nos. 22098 & 22099, 2005 WL 2292800 (Ohio Ct.App. Sept. 21, 2005),

> The elements of tortious interference with a business relationship are (1) a business relationship, (2) known to the tortfeasor, and (3) an act by the tortfeasor that adversely interferes with that relationship, (4) done without privilege and (5) resulting in harm. *Brookeside Ambulance, Inc. v. Walker Ambulance Serv.* (1996), 112 Ohio App.3d 150, 155-56, 678 N.E.2d 248. Specifically, element three requires an act that "causes a *third person* not to enter into or continue a business relation with another." (Emphasis added.) *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St.3d 1, 14, 651 N.E.2d 1283, 1995-Ohio-66. Also, this act must be done maliciously, "i.e., [with] knowledge of falsity or reckless disregard for the truth." *Id.* at 15, 651 N.E.2d 1283. Finally, it is worth emphasizing element four, that the interference must be without privilege. *See Fred Siegel Co., LPA v. Arter & Hadden* (1999), 85 Ohio St.3d 171, 176, 707 N.E.2d 853, 1999-Ohio-260.

Id. at *32. Tortious interference with business relationships includes intentional interference with prospective contractual relations not yet reduced to a contract. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co., Inc.*, 148 Ohio App.3d 596, 604 (2002), *citing Lapping v. HM Health Serv.*, No.2000-T-0061, 2001 WL 1602683 (Ohio Ct.App. Dec. 14, 2001). The record in the case at bar, however, establishes that the Marines were going to reject the plaintiff even without the statement of Ms. Spies. Further, the plaintiff specifically authorized Ms. Spies to make such

a statement. *See* Police Record Check release form. Doc. 156-5.

1. The U.S. Marine Corps Considered the Plaintiff's Conviction to be Reversed on a Technicality and, as Such, Did Not Consider Him a Suitable Candidate for the Corps

Plaintiff was not going to be accepted into the Marines, even absent Ms. Spies informing the recruiter that he was still a murder suspect. The recruiters were aware that the plaintiff had been convicted for murdering Devan Duniver, that the conviction was later reversed, and about the existence of the case at bar prior to speaking to Ms. Spies. According to the U.S. Marine Corps, the plaintiff's application was denied based upon the recruiter's determination that his conviction was reversed on a technicality. As such, the Marines did not want to risk jeopardizing the image of the Corps.

2. The Statement of Ms. Spies was Authorized by the Plaintiff

The Police Record Check release form (Doc. 156-5) permitted Ms. Spies, under a cloak of confidentiality, to provide the Marine Corps recruiters with the information they requested, *i.e.*, identification of past juvenile record and any current or pending court action. *Id.* at Nos. 12 and 13.The Marine Corps recruiters contacted and questioned Ms. Spies in accordance with their policy. Ms. Spies responded to their questions completely and truthfully, as she was authorized to do. That is not to say, however, that the

Court condones her impudent statement to Staff Sergeant Brahen.[10]

3. The Statement of Ms. Spies was Privileged

As previously stated, the interference must be without privilege. An individual may be privileged to act in a manner that would otherwise satisfy the elements of this claim. *Juhasz v. Quik Shops, Inc.*, 55 Ohio App.2d 51, 57 (1977). The applicability of a qualified privilege has been recognized by Ohio courts in both defamation and tortious interference cases. *See Smith v. Klein*, 23 Ohio App.3d 146, 148 (1985). The Court finds that the statement of Ms. Spies, made in response to a request for information by the Marine Corps recruiters, was privileged because of the Police Record Check release form (Doc. 156-5) signed by the plaintiff. Furthermore, the statement was true. As stated by a state court of appeals in *Ohio State Home Serv., Inc. v. Better Business Bur. of Akron, Inc.*, 89 Ohio App.3d 732 (1993):

> Similarly, summary judgment was appropriately granted as to the claim for tortious interference with business relationships. The qualified privilege and the requirement that the movant show actual

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[10] When Staff Sergeant Brahen went to the prosecutor's office and asked how he would go about getting the plaintiff's records, he was told that he would have to speak with Ms. Spies. Staff Sergeant Brahen testified: "At the time Miss Spies came out of the office, said are you fucking kidding me." Doc. 160 at 25-26.

> malice are the same for business interference as those discussed in regard to defamation.

Id. at 736. Summary judgment will be entered in favor of Ms. Spies on the plaintiff's claim for tortious interference with prospective business relationship.

V.

The Motion for Summary Judgment of defendants Amanda Spies and County of Tuscarawas, Ohio (Doc. 156-1) is GRANTED upon the grounds that there is no genuine issue as to any material fact and the movants are entitled to a judgment as a matter of law. Judgment will be entered in favor of defendants Amanda Spies and County of Tuscarawas, Ohio and against the plaintiff on the Amended Complaint.

IT IS SO ORDERED.

APPENDIX 3

2000 WL 748087 (Ohio App., 5th Dist. June 7, 2000)

COURT OF APPEALS OF OHIO
FIFTH DISTRICT
TUSCARAWAS COUNTY

No. 1999AP030013

[Filed June 7, 2000]

In the Matter of:	)
	)
Anthony H. Harris	)
	)

Character of Proceeding: Criminal Appeal from the Court of Common Pleas, Juvenile Division, Case No. 98JD00644. Affirmed in Part; Reversed in Part and Remanded.

Judges: Hon. W. SCOTT GWIN, P.J. Hon. WILLIAM B. HOFFMAN, J. Hon. JOHN W. WISE, J.

OPINION

WISE, J.

This matter is before the court upon an appeal by Appellant/Cross-Appellee Anthony Harris ("appellant"), from the Tuscarawas County Court of

Common Pleas, Juvenile Division, concerning his conviction for the murder of his five-year-old neighbor Devan Duniver. Appellee/Cross-Appellant ("appellee") State of Ohio appeals the juvenile court's decision to partially grant appellant's motion to suppress statements he made to an investigating officer, outside the presence of his mother, while being transported in a police cruiser and at the New Philadelphia Police Department. The following facts are pertinent to the issues that will be addressed in the appeal and cross appeal. On Saturday morning, June 27, 1998, Devan Duniver and her brother, Dylan Duniver, returned home from visiting with their father, for a week, in Cambridge, Ohio. At approximately 11:30 a.m. that morning, after returning to their apartment, Devan and Dylan went outside to play. Devan played outside for a few minutes and subsequently returned to the apartment where she rested on the couch with her mother, Lori Duniver, until approximately 12:00 p.m. When she got up from the couch, Devan changed her clothes and put on a pair of red shorts and a green Tasmanian Devil T-shirt. Devan again went outside to play.

A little after 12:00 p.m., Devan and Dylan stopped by the residence of Diane Murphy and asked to play with Diane's son, Adrian, and Chris Harris, appellant's brother. The boys indicated they could not come out to play. Thereafter, Devan returned home and was in and out of the apartment. At approximately 1:30 p.m., Lori Duniver told Devan to stay in the apartment while she went upstairs to get ready to go to the grocery store. However, Devan did not remain in the apartment and instead yelled up to Lori something about a little girl and left the apartment. Dale Ruegsegger, the

Duniver's next door neighbor, verified that Devan was playing with his daughter, in front of the apartments, at approximately 1:30 p.m.

Lori returned downstairs, at approximately 1:50 p.m., to gather the children in order to go to the grocery store. Devan was not in the apartment. Lori went outside and began calling for Devan. Lori went to the front of the apartment and asked Michael Harris, appellant's brother, whether he had seen Devan. Michael Harris responded that he had not seen her. Lori continued to call for Devan and eventually got in her car and drove to two houses, about one block away, where Devan was known to play. Lori stopped at the Murphy residence and learned that Devan and Dylan had been there earlier in the day. Lori also checked another friend's residence but nobody was home.

At approximately 2:00 p.m., Lori and Dylan returned home and went to the front of their apartment. Just as Lori turned the corner of the apartment building, appellant came around the opposite corner of the building. Lori asked appellant whether he had seen Devan and appellant responded that he had not seen her. Appellant also stated that he had just returned from the school. Lori and Dylan continued searching for Devan. Thereafter, Lori offered appellant $5 to help her look for Devan. Appellant accepted the money, following some hesitation, and assisted in the search.

Later in the afternoon, Lori telephoned family and friends concerning Devan's disappearance. Lori eventually sent appellant home at approximately 5:30 p.m., once family and friends began arriving at her

apartment to help in the search. After Lori learned that Devan's playmate, Kaitlyn, was out of town on vacation, Lori became convinced that something was wrong. Lori thereafter contacted the New Philadelphia Police Department at 8:11 p.m. Officer Shawn Nelson responded to the call. Lori provided Officer Nelson with a picture of Devan. Lori also informed Officer Nelson of an incident that occurred in June 1997, when her ex-boyfriend, Jamie Redman, took Devan for approximately two days.

The New Philadelphia Police as well as hundreds of volunteers searched for Devan, through violent thunderstorms, the entire night and early morning hours. The police organized a formal search on June 28 when Devan still had not been found. On that day, at approximately 2:30 p.m., Marsha Cross, an off-duty EMT, found Devan's body in the woods located behind the apartment complex where Devan and appellant lived. Devan's body was found in a small bare spot, in the dense brush, covered with w eds. The path leading to her body was a tunneled-out area of weeds and brush where children were known to crawl on their hands and knees.

Devan's body was covered with dirt and debris and her clothing and hair were wet. There was also substantial insect infestation in the mouth and neck regions. Devan's left foot was near a groundhog hole that was approximately one foot in diameter. There appeared to be a partial shoe print on the side wall of the groundhog hole.

The autopsy revealed that Devan died from seven stab wounds to the front of her neck. The stab wounds

partially severed her carotid artery. The autopsy further revealed that Devan had no defensive wounds on her hands. There was evidence of a blow to the top of her head and several other abrasions and contusions on her body. The Stark County Coroner ruled Devan's death a homicide.

Captain Jeff Urban of the New Philadelphia Police Department became the investigating officer. To begin eliminating suspects, Officers Nelson and Skinner investigated the whereabouts of Devan's father, Richard Duniver. Mr. Duniver was able to account for his whereabouts. The Columbus Police Department also verified the whereabouts of Jamie Redman. Captain Urban first contacted appellant about the murder, at appellant's residence, on June 29, 1998. Captain Urban asked appellant if he knew Devan's body had been found. Appellant responded that "* * * she was a nasty little girl and * * * that she would eat in front of him." Tr. Vol. VIII at 1813.

Captain Urban next spoke to appellant, on June 29, 1998, when appellant approached him. During this second conversation, appellant told Captain Urban that he had been at Ryan Eckert's house on June 27 and that Ryan's father dropped him off at his apartment. *Id.* Vol. VIII at 1816. Appellant then told Captain Urban that he walked home through an area between the sump and the woods. Appellant also stated that he arrived home just before 2:00 p.m.

Captain Urban returned to the appellant's residence on July 2, 1998. On this visit, Captain Urban had a discussion with appellant, his mother, Cynthia Harris, and his brother, Michael Harris. Captain

Urban tape recorded this conversation. On the tape, appellant stated that he left Ryan Eckert's house a little after 2:00 p.m. Appellant also stated that he walked around the far side of a business located near the wooded area. Captain Urban informed appellant that this was very close to the time that Devan was seen entering the woods. Captain Urban also informed appellant that Ryan Eckert and his mother told him that appellant left their house before 2:00 p.m.

Appellant subsequently changed his statement and told Captain Urban that he walked through the woods, on a little path that goes through the center of the woods, prior to 2:00 p.m. Appellant stated that he did not hear Lori calling for Devan. Captain Urban told appellant that he had some pictures, at the station, that he would like appellant and his brother, Michael, to review. Cynthia Harris agreed to permit her sons to review the pictures and told Captain Urban that she had to get her car keys and went into the apartment. Captain Urban asked appellant to ride with him, in his cruiser, to the police department. When Cynthia Harris returned from retrieving her keys, appellant had already left in Captain Urban's cruiser.

Captain Urban recorded the conversation he had with appellant while driving to the police department. After turning on the tape recorder, Captain Urban read appellant his Miranda rights. During this conversation, appellant mentioned that Devan had thrown part of a brick at him and hit him with it. Appellant also mentioned that a pocket knife was used to kill Devan. Subsequently, Cynthia Harris gave the New Philadelphia Police Department permission to search their apartment. During the search, officers

retrieved the clothing and shoes appellant wore the day Devan disappeared. The officers did not discover a knife at appellant's residence.

Captain Urban next spoke to appellant on July 15, 1998, when appellant, Cynthia Harris and Michael Harris went to the police department for purposes of a voice stress test. The voice stress test was to be administered to both appellant and Michael Harris. Chief Thomas Vaughn, of the Millersburg Police Department, had already administered a voice stress test to Dylan Duniver on July 14. Upon their arrival at the police station, Chief Vaughn explained the voice stress test to appellant, his mother and Michael Harris. Chief Vaughn also read a consent form to them. The heading on the form stated: "CONSENT TO COMPUTERIZED VOICE STRESS ANALYZER EXAMINATION (TRUTH VERIFICATION)." Neither appellant nor Cynthia Harris indicated they had any questions and both signed the consent form. Captain Urban and Chief Vaughn both signed the form as witnesses.

Cynthia Harris told Captain Urban that she would like to be in the room with appellant as Chief Vaughn administered the test. Captain Urban informed Cynthia Harris, in appellant's presence, that it was important for appellant and Chief Vaughn to be alone during the test, but that she would be able to watch the testing process through a two-way mirror. Captain Urban also indicated that she would be able to hear the conversation between Chief Vaughn and appellant.

Chief Vaughn explained to Cynthia Harris that he would begin with a pre-test interview which is

mandated by the National Institute of Truth Verification as part of the voice stress test procedure. At the suppression hearing, Chief Vaughn testified: "It's to build a rapport. It's for me to be able to establish a rapport with them. It's for me to be able to get him comfortable with me." *Id.* Vol. I at 245.

Chief Vaughn escorted appellant into an interview room, closed the door, and began recording the interview. Upon entering the room, Chief Vaughn immediately read appellant his Miranda rights. Chief Vaughn explained to appellant that he was not under arrest and that he could leave the room at any time as the door was not locked. After a few questions concerning whether appellant liked sports, Chief Vaughn began questioning appellant. The questioning by Chief Vaughn lasted approximately one hour. During the interview, Chief Vaughn repeatedly accused appellant of killing Devan. Chief Vaughn also made other statements in an effort to get appellant to confess to the murder. Appellant denied his guilt numerous times but subsequently made several incriminating statements. Chief Vaughn never administered the voice stress test.

After making the incriminating statements, Chief Vaughn asked appellant to make a written statement concerning the murder of Devan. At that point, appellant asked for his mother and indicated that he would tell her what happened. When Cynthia Harris entered the room, appellant recanted his incriminating statements and told her that he did not kill Devan. Following several minutes of direct questioning by his mother, appellant continued to deny his guilt. Finally, Cynthia Harris stopped the questioning and stated

that she wanted to contact an attorney. Appellant was taken into custody and transported to the Multi-County Attention Center.

On July 16, 1998, the New Philadelphia Police Department filed a complaint, with the Juvenile Division of the Tuscarawas County Court of Common Pleas, alleging appellant murdered Devan Duniver. Appellant entered a denial to the charge on July 24, 1998. On August 17, 1998, and September 1, 1998, appellant filed motions to suppress. The juvenile court set the suppression motions for a hearing on September 28, 1998. On September 21, 1998, the state moved to continue the suppression hearing because defense counsel failed to provide, to the state, the defense's experts' reports. The court granted the continuance. Following the filing of various motions and a Writ of Habeas Corpus, by defense counsel, the juvenile court set a discovery deadline, scheduled the final pre-trial and ordered that the suppression hearing and adjudicatory hearings commence on January 11, 1999. The court further ordered that because this matter would proceed as a bench trial, the suppression issues would be heard within the adjudicatory hearing as necessary. As a result of further motions filed by defense counsel, the juvenile court rescheduled the suppression and adjudicatory hearings for January 25, 1999. The suppression hearing commenced on this date. The juvenile court commenced the adjudicatory hearing on February 4, 1999.

On February 25, 1999, the juvenile court filed a judgment entry partially granting appellant's motion to suppress. The juvenile court overruled appellant's

motion to suppress the admission of items found in the search of the Harris apartment on July 2, 1998. The juvenile court granted appellant's motion to suppress statements appellant made to Captain Urban, in Urban's cruiser, on the way to the New Philadelphia Police Department. The juvenile court also suppressed statements appellant made to Captain Urban, at the police department, while outside the presence of his mother. The juvenile court overruled appellant's motion to suppress statements appellant made to Captain Urban, on July 2, 1998, while at the New Philadelphia Police Department, in the presence of Captain Urban and Cynthia Harris. Finally, the juvenile court overruled appellant's motion to suppress statements appellant made to Chief Vaughn, during the questioning, on July 15, 1998.

The adjudicatory hearing concluded on March 4, 1999. On March 10, 1999, the juvenile court found the state had proven, beyond a reasonable doubt, that appellant purposely caused the death of Devan Duniver. On March 17, 1999, the court ordered that appellant be committed to the Department of Youth Services until his twenty-first birthday. The court also imposed a fine of $1,800 and court costs.

Appellant timely filed a notice of appeal. The state filed a notice of cross appeal. The parties set forth the following assignments of error for our consideration:

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE ADJUDICATION AGAINST ANTHONY HARRIS.

II. THE JUVENILE COURT ERRED IN DENYING ANTHONY HARRIS' MOTION TO SUPPRESS THE STATEMENTS HE MADE DURING A COERCIVE, CUSTODIAL INTERROGATION ON JULY 15, 1998, BECAUSE THOSE STATEMENTS WERE ELICITED IN VIOLATION OF HIS CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION.

III. THE JUVENILE COURT VIOLATED ANTHONY HARRIS' STATE AND FEDERAL CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM BY TAKING JUDICIAL NOTICE OF DISPUTED HEARSAY TESTIMONY FROM A PRIOR HEARING.

IV. ANTHONY HARRIS WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

V. THE JUVENILE COURT'S DEMONSTRATED BIAS AGAINST ANTHONY HARRIS VIOLATED HIS DUE PROCESS RIGHTS UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

VI. ANTHONY HARRIS WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL.

VII. THE JUVENILE COURT ABUSED ITS DISCRETION IN SENTENCING ANTHONY HARRIS TO THE

DEPARTMENT OF YOUTH SERVICES UNTIL HIS 21ST BIRTHDAY.

Cross-Appeal

I. THE TRIAL COURT ERRED IN FINDING THAT THE CROSS-APPELLEE WAS SUBJECT TO "CUSTODIAL INTERROGATION," AND, THEREFORE ENTITLED TO MIRANDA WARNINGS, WHILE BEING QUESTIONED BY THE INVESTIGATING OFFICER IN HIS POLICE CRUISER AND THE POLICE STATION, OUTSIDE THE PRESENCE OF THE CROSS-APPELLEE'S MOTHER.

II. THE TRIAL COURT ERRED IN FINDING THAT THE CROSS-APPELLEE FAILED TO KNOWINGLY AND VOLUNTARILY WAIVE HIS MIRANDA RIGHTS PRIOR TO QUESTIONING BY THE INVESTIGATING OFFICER.

II

We will begin by addressing appellant's Second Assignment of Error as we find it dispositive of this matter on appeal. Appellant contends, in this assignment of error, that the juvenile court erred when it denied his motion to suppress statements he made during a coercive, custodial interrogation on July 15, 1998, because the statements were elicited in violation of his constitutional right against self-incrimination. We agree.

There are three methods of challenging, on appeal, a trial court's ruling on a motion to suppress. First, an

appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *See State v. Fanning* (1982), 1 Ohio St.3d *19; State v. Klein* (1991), 73 Ohio App.3d 486; *State v. Guysinger* (1993), 86 Ohio App.3d 592. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *See State v. Williams* (1993), 86 Ohio App.3d 37.

Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysiner, supra*. In the matter currently before the court, we find appellant challenges the juvenile court's decision concerning the ultimate issue raised in his motion to suppress. Thus, in analyzing this assignment of error, we must independently determine whether the facts meet the appropriate legal standard.

In its entry of February 25, 1999, the juvenile court overruled appellant's motion to suppress on the basis that appellant was not in custody when he made incriminating statements to Chief Vaughn. Judgment

Entry, Feb. 25, 1999, at 8. The juvenile court concluded that the "custody" element necessary to invoke Miranda warnings occurred well after appellant made the incriminating statements and the prosecutor was contacted. *Id.* The juvenile court also concluded appellant understood the Miranda warnings administered by Chief Vaughn and knowingly and voluntarily waived them. *Id.* at 8-9.Finally, the juvenile court found that Chief Vaughn's persistent questioning did not constitute undue coercion so as to render appellant's incriminating statements involuntary. *Id.* at 9. Appellant challenges all three of the juvenile court's findings on appeal.

A. Custodial Interrogation

The United States Supreme Court has emphasized that the admissions and confessions of juveniles require special attention. *Haley v. Ohio* (1948), 332 U.S. 596. In the case of *In re Gault* (1967), 387 U.S. 1, the United States Supreme Court recognized that constitutional rights, such as right to counsel and the Fifth Amendment privilege against self-incrimination, are applicable to juveniles. Under the case of *Miranda v. Arizona* (1966), 384 U.S. 436, statements resulting from custodial interrogations are admissible only after a showing that the procedural safeguards have been followed. "Custody" is when a defendant is taken into custody " * * * or otherwise deprived of his freedom by the authorities in any significant way and is subject to questioning * * *." *Miranda* at 478. The custody must be under the control of the state. *State v. Giallombardo* (1986), 29 Ohio App.3d 279, 280.

The test in determining whether a defendant is in "custody" is whether a reasonable person, under the circumstances, would think he or she was under arrest. *Berkemer v. McCarty* (1984), 468 U.S. 420, 442. "Custodial arrest * * * [conveys] to the suspect a message that he has no choice but to submit to the officer's will and confess." *Minnesota v. Murphy* (1984), 465 U.S. 420, 423. The Supreme Court of Ohio has also held that "[w]hen a statement, question, or remark by a police officer is reasonably likely to elicit an incriminating response from a suspect, it is an interrogation." *State v. Knuckles* (1992), 65 Ohio St.3d 494, paragraph two of the syllabus.

Based on our review of the record in this matter, we conclude that after Chief Vaughn completed asking appellant questions from the Interview Tabulation Sheet and continued to question appellant about his involvement in the murder of Devan Duniver, the questioning became an interrogation because Chief Vaughn asked questions and made comments that were likely to elicit incriminating responses from appellant.

At the suppression hearing in this matter, Chief Vaughn testified to the purpose of the pre-test interview. Chief Vaughn stated that the pre-test interview is necessary "* * * so that you can determine what their understanding of the questions or the subject that you're going to be talking about. You try to build a rapport to release as much stress as you can before you start the test." Tr. Vol. I at 240, 245. Chief Vaughn also described the pre-test interview as "* * * a relaxing period so that we both become familiar with each other and comfortable with each other." *Id.* at

246.Chief Vaughn also explained that the questions from the Interview Tabulation Sheet are part of the pre-test interview. *Id.* at 249.

On cross-examination, Chief Vaughn admitted that four or five pages into the transcript of the interview conducted on July 15, 1998, he completed asking the questions from the Interview Tabulation Sheet. *Id.* Vol. II at 331. However, Chief Vaughn further stated that the questions contained in the Interview Tabulation Sheet are not all of the questions that are part of the pre-test interview. *Id.* at 331, 332.Chief Vaughn characterized the questions he continued to ask appellant, after completing the questions from the Interview Tabulation Sheet, as pre-test interview questions or follow-up questions. *Id.*

After reading the transcript and listening to the tape recording of the interview, we find that Chief Vaughn's continued questioning of appellant, after completing the questions from the Interview Tabulation Sheet, resulted in a custodial interrogation. Almost immediately, Chief Vaughn began accusing appellant of the murder and asking questions that were reasonably likely to elicit incriminating responses. Chief Vaughn first indirectly accused appellant by asking appellant "Can you think of any reason why the lab might come back and say that there was blood of the victims in your pockets? Could there be blood of the victim's in your pockets?" *Id.* Vol. I at 267. Appellant responded "No." *Id.* Chief Vaughn next asked appellant "Any reason why your shoe prints would be real close to where she was found?" *Id.* Appellant again responded "No." *Id.*

Following several more pages of questioning, Chief Vaughn directly asked appellant "Did you do this crime, Anthony?" *Id.* at 271-272.Appellant responded "No." *Id.* at 272.Chief Vaughn immediately asked "Are you sure about that?" *Id.* Appellant responded "I'm sure." *Id.* Four questions later Chief Vaughn asked appellant "You're sorry you did this, aren't you. You didn't mean to kill her, did you?" *Id.* at 273.Appellant responded "I didn't kill her." *Id.*

At this point, Chief Vaughn became more persistent with his questioning. Chief Vaughn stated to appellant "I think that both of us know that something happened out there and see, that's the thing that you got to tell me. You got to tell me what she did to make you so mad. Because I don't think you did it just to-I don't think you were hiding behind no tree just to, just to do it. * * * I don't think you planned on doing this and I'd like to help you out of this, Anthony, * * *. Now I just assume (sic) not have to turn my instrument on, I just assume (sic) not have you take a test if you did this because I think you did. I'll be honest with you, I think you did and you know you did but if I do the test, then we're sort of stuck with me doing the test on you, do you understand?" *Id.* at 273-274.In his next question to appellant, Chief Vaughn asked appellant "You want to take back what you did to her, don't you? Can you tell me why, what she did to make you so mad?" *Id.* at 275.

Finally, prior to appellant making his first incriminating statement, Chief Vaughn made the following statement: "If you just happened to be walking through the woods, which I think is what happened and she was there and she did something

nasty to you and you just snapped. You said you little nasty kid and you chased her after you did this. That's what happened, isn't it? That's what happened, isn't it, Anthony?" *Id.* at 279.

Pursuant to the record of the questioning by Chief Vaughn, we find a reasonable twelve-year-old child would think he was under arrest. We are persuaded that this type of questioning conveyed to appellant that he had no choice but to submit to Chief Vaughn's will and confess to the murder of Devan Duniver. Further, this questioning took place in an interview room at the New Philadelphia Police Department. The door to the interview room was closed during the questioning. *Id.* at 246. Although Chief Vaughn informed appellant that he was free to go and the door was not locked, due to the nature of the questions asked by Chief Vaughn and Chief Vaughn's repeated statements, to appellant, that he knew appellant committed this murder, we do not believe appellant thought he could terminate the questioning and walk out of the room.

Thus, we disagree with the juvenile court's conclusion that appellant was not in custody, on July 15, 1998, while being questioned by Chief Vaughn. Chief Vaughn's pre-test interview of appellant, for purposes of a voice stress test, became a custodial interrogation after he completed asking appellant questions from the Interview Tabulation Sheet.

B. Waiver of Miranda Rights

Having found that appellant was in custody during the interview on July 15, 1998, we must next

determine whether appellant knowingly, voluntarily and intelligently waived his Miranda rights. Chief Vaughn did not read appellant his Miranda rights in the presence of his mother, Cynthia Harris. Instead, once Chief Vaughn obtained consent to perform the voice stress test, he took appellant to the interview room where he intended to conduct the test. After entering the room and turning on the tape recorder, Chief Vaughn read appellant his Miranda rights as follows:

VAUGHN: Before we get started, Anthony, I need to read something to just, just so that I'm sure that you understand, okay.

ANTHONY: Okay.

VAUGHN: You know you have the right to remain silent, you don't have to talk to me, you don't have to say anything if you don't want to. Anything you say can and will be used against you in the court of law, understand that?

ANTHONY: Au-hau.

VAUGHN: Okay. You have the right to consult, to talk to an attorney or have an attorney present while I'm talking to you. Do you understand that?

ANTHONY: Yeah.

VAUGHN: Okay. If you cannot afford a lawyer, one will be appointed at the expense of the

court to represent you. Okay, do you understand all that?

ANTHONY: Yeah.

VAUGHN: And you're free to go. Your mom is watching from, from behind that glass so she can see what's going on. So she can see I'm not threatening you or doing anything else. We're just trying to get this test done, and, you know, if you don't like what I'm asking you, you can say, wait a minute, let's stop, I want to go talk to mom, or I want to leave, or I don't like it here. You are willing to do that? That door's not locked, you can walk right out that door, okay? And you know, you can stop answering questions at anytime you like. We do need to try to get through the test and I certainly need you to answer my questions in order to do that, okay?

ANTHONY: Okay. *Id.* at 259-260.

The juvenile court found that appellant knowingly, voluntarily and intelligently waived his Miranda rights. The juvenile court concluded that the explanation of Miranda rights Chief Vaughn gave to appellant went beyond the actual warnings and was stated in plain, non-technical, simple language. Judgment Entry, Feb. 25, 1999, at 9. The juvenile court further concluded that appellant understood his rights enough to decline to write a statement and ask for his mother. *Id.*

The United States Supreme Court has emphasized that admissions and confessions of juveniles require special attention. *Haley v. Ohio* (1948), 332 U.S. 596. Custodial statements are not admissible unless the state can prove that the defendant knowingly, voluntarily and intelligently waived his or her Miranda rights. In the case of *In re Gault*, *supra*, at 55, the United States Supreme Court stated:

> We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique-but not in principle-depending upon the age of the child and the presence and competence of parents. * * * If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

The Ohio Supreme Court has rejected the rule accepted in other states that both a juvenile and his parents or guardian must be informed of the juvenile's rights to an attorney and to remain silent prior to any custodial interrogation in order for any statement or confession by the juvenile to be admissible at his or her trial. Instead, in Ohio, in order to determine whether a juvenile has waived his or her rights to remain silent and to have the assistance of counsel, we must examine the totality of the circumstances surrounding

the waiver. *Bobo, supra*, at 689;In re Watson (1989), 47 Ohio St.3d 86, 89.

The totality-of-the-circumstances approach requires an inquiry into all the circumstances surrounding the interrogation. This includes the age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement. *State v. Edwards* (1976), 49 Ohio St.2d 31, paragraph two of the syllabus.

On July 15, 1998, when Chief Vaughn questioned appellant he was twelve years old. There is no indication from the record that appellant suffered any physical deprivation or mistreatment while Chief Vaughn questioned him. In fact, from the taped recording of Chief Vaughn's questioning, it is clear that Chief Vaughn at all times spoke to appellant in a regular tone of voice. Chief Vaughn never raised his voice or yelled at appellant. However, due to the nature of the questions asked by Chief Vaughn, Vaughn's numerous statements accusing appellant of this crime, and appellant's emotional state, we find the interview was very intense. There is no indication, in the record, that Chief Vaughn threatened or induced appellant to waive his Miranda rights. Chief Vaughn only interviewed appellant once and the interview lasted approximately one hour. The record also indicates that appellant had no prior criminal experience.

As to appellant's mentality, Dr. Kathleen Quinn, assistant director of psychiatry training at the

Cleveland Clinic Foundation, testified that appellant has normal intelligence for a child his age. Tr. Vol. II at 495. Dr. Quinn also testified that within a reasonable degree of medical certainty, appellant was not competent to appreciate his Miranda rights and waive them. *Id.* at 514. Dr. Steven Neuhaus, a clinical psychologist at University Hospitals Health System, also testified as to appellant's mentality. *Id.* at 578. According to Dr. Neuhaus, within a reasonable degree of medical certainty, appellant was not able to knowingly, voluntarily and intelligently waive his Miranda rights. *Id.* Vol. III at 652.

The state did not present a witness to rebut the testimony of the above two witnesses concerning appellant's ability to understand the Miranda warnings. However, on direct examination, Dr. Neuhaus testified that appellant had an IQ of 102 which is normal. *Id.* at 598. On cross-examination, Dr. Neuhaus agreed the reading level of the Miranda warnings is approximately eighth grade equivalent. *Id.* at Vol. III at 674. The state relies on this to establish that appellant was capable of understanding the Miranda warnings.

Finally, in Bobo, supra, at 690, the Eighth District Court of Appeals stated that the presence or absence of a parent is a factor to consider in the totality of the circumstances surrounding the statement. As noted above, appellant's mother was not present when Chief Vaughn read appellant his Miranda rights. For whatever reason, Chief Vaughn chose to read appellant his Miranda rights after he separated appellant from his mother.

Since appellant's mother was present at the New Philadelphia Police Department and had just consented to the voice stress test, the better approach would have been for Chief Vaughn to obtain a waiver of appellant's Miranda rights in the presence of his mother. We believe a reasonable twelve-year-old child would not make a distinction between consenting to take a voice stress test and waiving his Miranda rights. Especially when appellant's mother had just given her consent for the test and appellant was under the impression that his mother wanted him to take the test. Thus, having failed to read appellant his Miranda rights in the presence of his mother, this factor negatively impacts on whether appellant made a knowing, voluntary and intelligent waiver.

We conclude, based on the above evidence, that due to appellant's age, the intensity of the interview, the lack of appellant's criminal experience, and the absence of his mother when appellant allegedly waived his Miranda rights, appellant's waiver was not knowing, voluntary and intelligent. We also find Chief Vaughn's explanation of appellant's Miranda rights was not sufficient in that it did little more than convey the basic Miranda warnings to appellant. The only explanation Chief Vaughn provided to appellant, above and beyond the basic reading of the Miranda rights, is the following comment made by Chief Vaughn: " * * * [Y]ou're free to go. * * * if you don't like what I'm asking you, you can say, wait a minute, let's stop, I want to go talk to mom, or I want to leave, or I don't like it here. * * * That door's not locked, you can walk right out that door, okay? And you know, you can stop answering questions at any time you like. We do need to try to get through the test and I certainly need you

to answer my questions in order to do that. * * * " Tr. Vol. I at 260.

Further, Chief Vaughn admitted to the following on cross-examination:

MR. LOCONTI: * * * And so by looking at that transcript and the tape that we've just read and the portion of the transcript that you've just read, you can agree with me, can't you, that what you just read is all that you did with respect to the Mirandizing procedure on Anthony Harris; is that correct?

CHIEF VAUGHN: Yes.

MR. LOCONTI: Okay. You did not take any other efforts to explain to Anthony what any of those rights meant or to explain to him what each of those different items you were reading to him or telling him meant to him; is that fair?

CHIEF VAUGHN: That's fair.

MR. LOCONTI: And you did not take any other steps to question him about what his understanding was of those different items that you read to him, correct?

CHIEF VAUGHN: Other than asking if he understood.

MR. LOCONTI: And when he would respond yes or yeah, you did not make any inquiry to understand what was in his mind when he answered yeah or yes; is that fair?

CHIEF VAUGHN: That's fair. *Id.* Vol. II at 326-327.

Even though Chief Vaughn told appellant that he did not have to answer his questions, in the same sentence he made it clear that appellant needed to complete the test and appellant would have to answer his questions in order to do that. Such a statement by Chief Vaughn sent a mixed message to appellant. Thus, based on the minimal explanation of his Miranda rights and the other factors addressed above, we disagree with the juvenile court's conclusion that appellant knowingly, voluntarily and intelligently waived his Miranda rights.

C. Undue Coercion

Even if we were to conclude that appellant was not in custody or that he was in custody and that he knowingly, voluntarily and intelligently waived his Miranda rights, we still find the incriminating statements made by appellant, to Chief Vaughn, were the result of undue coercion and therefore inadmissible at the adjudicatory hearing.

In concluding that appellant's incriminating statements were not the result of undue coercion, the

juvenile court found that although Chief Vaughn was persistent in his remarks to appellant, this is permissible under a lawful homicide investigation and does not constitute coercion or violations of Miranda. Judgment Entry, Feb. 25, 1999, at 9. The factors contained in Edwards, supra, that we considered in determining whether appellant knowingly, voluntarily and intelligently waived his Miranda warnings, are the same factors we must consider in determining whether appellant's confession was coerced.

Although we have already addressed these factors as they pertain to the waiver of appellant's Miranda rights, we find it necessary to further address Chief Vaughn's use of threats or inducements, as applied to the voluntariness of appellant's incriminating statements, as this factor is pivotal in the case sub judice. Again, it is important to remember that Chief Vaughn used these techniques on a twelve-year-old child that was entering seventh grade.

We will discuss the following techniques we find resulted in appellant making coerced admissions. Chief Vaughn began by first making a distinction between two different types of people that would have committed this crime. Chief Vaughn never gave appellant the option of being a person that did not commit the crime. For example, Chief Vaughn explained to appellant "There's the dishonest people that that (sic) meant to do it and did it out of spite, did it out of meanness or there's people that it just happened. And if there is anything in the world that they could take back, it's doing that crime and hurting her." Tr. Vol. I at 271. Further into the interview Chief Vaughn again stated " * * * either you're fooling me

and fooling your mom and you're just a spiteful kid that just didn't like her and you just killed her. Just plain, your're nasty, you hid it well from your mom and other kids that you're alone in the woods there and that spite came out or you're the kind of kid I think you are that I think you know who your mom thinks you are, you're a stand-up guy. You stand up for other people, but when you were in the woods she did something to really piss you off and you did something out of character." *Id.* at 276.

Chief Vaughn then made it clear that there was only one type of person he could help. He explained to appellant "Now the only thing that we have to find out is what kind of person you are, what of those two people are you. Are you the good person on this side or are you the nasty person that's just hiding behind the person you are, proving wrong to everybody? Now, this is that person that I think you are, and that's the person I want to present to Court, okay. That's the person that I'll help. This person, you know, I can't help that person, bottom line. If you're not honest with me, if you don't care about me, then you don't want my help and I can't help you." *Id.* at 277. Finally, Chief Vaughn concluded with this technique by stating "You're either the nasty person or the decent person and it's the choice that you've got to take (sic), either the nasty person. I mean, are you a mean and nasty kid underneath and you're just waiting to strike out at somebody?" *Id.* at 278. By the use of this technique, we find that a twelve-year-old boy would believe he had no choice but to be the decent person that for whatever reason committed this crime.

Chief Vaughn also used the voice stress test as a mechanism to persuade appellant to make admissions. Chief Vaughn stated to appellant " * * * I can't help you if you're not honest with me and you know I will be able to tell, once I give the test, if you're telling the truth. I'll know that. And again, I would like to know before I give the test, so that I don't have to send the Court or the prosecutor's office or anybody else I listed on there that I did the test and Anthony lied to me on this test. That's the worst thing in the world that could happen here. * * *" *Id.* at 272.Shortly thereafter, Chief Vaughn again stated to appellant "Now I just assume (sic) not have to turn my instrument on, I just assume (sic) not have you take a test if you did this because I think you did. I'll be honest with you, I think you did and you know you did but if I do the test, then we're stuck with me doing the test on you, do you understand?" *Id.* at 274.

Chief Vaughn even went so far as to tell appellant that the results of the voice stress test would be admitted at an adjudicatory hearing even though Chief Vaughn testified at the suppression hearing that he knew they would not be admissible. *Id.* Vol. II at 346. This is evidenced by the following statement Chief Vaughn made to appellant: "When your test results come back that, you know, whether you tell me or not doesn't matter because those test results are going to stand on there own and it's just like any other evidence, it will be introduced in Court and the punishment is going to be at the end." *Id.* Vol. I at 274.

Again, Chief Vaughn told appellant that it would be better for him to just tell him what happened instead of taking the voice stress test. "If we take the test and

we go through it and I have to say you're not telling the truth verses you and I talking about what happened, how it happened and and getting it down so that you have the opportunity to tell your side, * * *." *Id.* Finally, Chief Vaughn informs appellant that if he has to administer the voice stress test, he will be past the point where he can help him. " * * * I want to get through this because I've done this for a lot of years and I know how to tell when people are telling me the truth or not. Sometimes it takes me to running the test and showing them, look, this is where you lied to me, but I'm sort of past the point that I can help that person." *Id.* at 277.

We find these series of statements conveyed to appellant that it would be better for him to tell Chief Vaughn what happened rather than take the voice stress test, because once he had the results of the test and if appellant failed the test, Chief Vaughn would no longer be able to help him. However, prior to entering the interview room with Chief Vaughn, Chief Vaughn made it very clear to both appellant and his mother that he wanted to administer the test, not as a last resort method of determining appellant's guilt, and that the test would be administered in a non-confrontational setting so appellant would be calm and relaxed. The record establishes that this is not what happened once Chief Vaughn and appellant entered the interview room. Instead, the interview became confrontational almost immediately. Further, instead of calming appellant down prior to administering the test, Chief Vaughn had appellant in tears at one point. *Id.* Vol. II at 386.

We also note details about this crime that Chief Vaughn offered to appellant in his attempt to induce appellant into making a confession and which appellant incorporated in his guilty admissions. Chief Vaughn asked appellant how many times he stabbed Devan. Appellant responded that he did not know. Id. Vol I at 281. Chief Vaughn asked him whether it was five or six times. *Id.* Appellant responded "No." *Id.* at 282. Chief Vaughn suggested one or two times and appellant stated "Probably twice." *Id.* Further, Chief Vaughn was the first person to mention that Devan was found with one leg in a groundhog hole. This portion of the interview is as follows:

VAUGHN: Okay. Now, she was found sort of underneath some brush and her one leg was in, what I-I've not been there, like I said before, I'm not lying to you, just coming in here so I don't know all the particulars, but it looks like it was a groundhog hole or something. Do you know what I'm talking about?

ANTHONY: Yeah.

VAUGHN: Did you see the groundhog hole when you were stabbing her?

ANTHONY: No.

VAUGHN: You just knew it was there from before?

ANTHONY: I just knew it from before. *Id.* at 293.

Finally, another fact Chief Vaughn suggests to appellant concerns when appellant returned the knife to Zach Ellwood. This conversation is as follows:

VAUGHN: Did you give it to him yourself?

ANTHONY: Au-hau.

VAUGHN: Or did you hide it at his house?

ANTHONY: I gave it to him the next day.

VAUGHN: Okay. And it was, you know it wasn't that night? You or you are just not sure?

ANTHONY: I'm not sure.

VAUGHN: It could have been that night or it could have been that next day? I'm not trying to confuse you, I just want-I just want to get everything down correctly, okay.

ANTHONY: It could be the next day, I don't know.

VAUGHN: Okay, Let me ask you this, do you know how many days after you, you did this, was it that you gave him back the knife? Could it have been a week?

ANTHONY: Probably. *Id.* at 295-296.

Appellant clearly states when first asked when he returned the knife that he did so the day after the murder. *Id.* at 295.However, as Chief Vaughn continued to question him about this, appellant was

unsure and when Chief Vaughn asked him whether it could have been a week later, appellant responds "Probably." *Id.* at 296. The above facts represent pertinent details of this crime which we find Chief Vaughn suggested to appellant. It also appears from appellant's responses that he was attempting to agree with whatever Chief Vaughn said to him.

Based on appellant's age, lack of criminal experience, and length of the interview, in conjunction with the statements made by Chief Vaughn to get appellant to confess to this crime, we disagree with the juvenile court's conclusion that appellant's confession was voluntary, as it pertains to the portion of the interview conducted by Chief Vaughn.

After making guilty admissions and prior to making a written statement, appellant asked to speak with his mother. Appellant told Chief Vaughn that he would tell her what happened. At that point, Cynthia Harris, Captain Urban and Chief Vaughn returned to the interview room and all three began asking appellant more questions about the crime. For the reasons stated above, the questions Chief Vaughn asked appellant and appellant's responses during this portion of the interview should have been suppressed by the juvenile court. Further, for these same reasons, the questions asked by Captain Urban and appellant's responses should have also been suppressed.

During this portion of the interview, Cynthia Harris asked very direct questions concerning appellant's involvement in this matter. Because appellant seeks to have the entire interview suppressed, we must determine whether the trial

court's decision not to suppress that portion of the interview, where Cynthia Harris questioned appellant about his involvement in the murder, is against the manifest weight of the evidence.

The Ohio Supreme Court addressed a similar question in *State v. Watson* (1971), 28 Ohio St.2d 15. In Watson, a defendant made incriminating statements to a newspaper reporter. The trial court permitted the newspaper reporter to testify about the statements the defendant made to him because no law enforcement officers participated in the questioning by the reporter. *Id.* at 26. On appeal, defendant argued that the trial court erred in refusing to suppress his in-custody statements made to the reporter without determining whether such statements were influenced by earlier statements made by him to the police. *Id.*

The Court ultimately held that:

> Inasmuch as custodial interrogation, as defined in *Miranda v. Arizona*, 384 U.S. 435, 86 S.Ct. 1602, 16 L.Ed.2d 694, means 'questioning initiated by law enforcement officers after a person has been taken into custody,' the Miranda requirements do not apply to admissions made to persons who are not officers of the law or their agents, and a statement made by a defendant, who is in custody, * * * is admissible whether or not it may have been influenced by earlier statements made by the defendant to the police. *Id.* at paragraph five of the syllabus.

Prior to its decision in Watson, the Court reached a similar conclusion in *State v. Bolan* (1971), 27 Ohio St.2d 15, that:

> * * * [T]he duty of giving 'Miranda warnings' is limited to employees of governmental agencies whose function is to enforce law, or to those acting for such law enforcement agencies by direction of the agencies; that it does not include private citizens not directed or controlled by a law enforcement agency, even though their efforts might aid in law enforcement. *Id.* at 18.

Based on the above case law, we conclude that although appellant was in custody when Chief Vaughn questioned him about Devan's murder, the questioning conducted by Cynthia Harris was not a custodial interrogation because Cynthia Harris is not a law enforcement officer nor did she act as an agent for Chief Vaughn or Captain Urban while questioning appellant on July 15, 1998. Had Captain Urban asked Cynthia Harris to help him question appellant, as he did on July 2, 1999, we would have reached a different conclusion. See State's Exhibit L, Interview July 2, 1998, at 25. Accordingly, we agree with that portion of the trial court's decision denying appellant's motion to suppress statements appellant made to his mother Cynthia Harris, during questioning by her on July 15, 1998.

Appellant's Second Assignment of Error is sustained in part and overruled in part. We will not address appellant's Assignments of Error One, Three, Four, Five, Six, and Seven as they are moot based on

our disposition of appellant's Second Assignment of Error.

Cross-Appeal

I

Appellee State of Ohio argues, in its First Assignment of Error on cross-appeal, that the trial court erred when it found appellant was subject to custodial interrogation when Captain Urban questioned him in his police cruiser and at the New Philadelphia Police Department, outside the presence of appellant's mother, on July 2, 1998. We disagree.

In this assignment of error, appellee does not appear to be challenging the juvenile court's findings of fact. Nor does appellee claim the juvenile court failed to apply the appropriate test or correct law to the findings of fact. Instead, appellee claims the juvenile court failed to correctly decide the ultimate or final issue raised in appellant's motion to suppress. In reviewing this type of claim, we must independently determine, without deference to the juvenile court's conclusion, whether the facts meet the appropriate legal standard. Curry, *supra*, at 96; Claytor, supra, at 627.

In its judgment entry, the juvenile court found that a custodial interrogation commenced when Captain Urban placed appellant in his police cruiser and drove him to the police department and continued until appellant's mother was brought to him at the police department. Judgment Entry, Feb. 25, 1999, at 7. The juvenile court further concluded that although Captain

Urban gave appellant Miranda warnings, he did so in a cursory manner and appellant was not given an opportunity to fully understand their meaning and therefore, did not knowingly and voluntarily waive them. *Id.*

As discussed above, in appellant's Second Assignment of Error, the applicable test in determining whether a defendant is in "custody" is whether a reasonable person, under the circumstances, would think he or she was under arrest. Berkemer, supra, at 442. Further, " * * * when a statement, question, or remark by a police officer is reasonably likely to elicit an incriminating response from a suspect, it is an interrogation." Knuckles, supra, at paragraph two of the syllabus.

Our review of the record indicates that Captain Urban's questioning of appellant, on July 2, 1998, while in the police cruiser and outside the presence of appellant's mother, was more than a mere general investigatory questioning of a witness. As soon as Captain Urban had the opportunity to separate appellant from his mother, he did so. Captain Urban asked Cynthia Harris, appellant and appellant's brother, Michael, to come to the police station to review some photographs. Tr. Vol. I at 82. Cynthia Harris agreed and went into the apartment to retrieve her car keys. *Id.* As soon as Cynthia Harris left to get her car keys, Captain Urban quickly placed appellant in the front seat of his police cruiser and departed. *Id.* Cynthia Harris exited her apartment just in time to see Captain Urban pulling away in his cruiser with appellant inside. *Id.*

Captain Urban tape recorded the conversation he had with appellant while driving to the police department. Almost immediately upon entering the cruiser, Captain Urban read appellant his Miranda rights:

> * * * Okay, on the way here, it's policy for us, you have the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to talk to an attorney, have him present with you while you're being questioned. If you can't afford an attorney, one will be provided for you prior to any questioning if you so desire. We have to do that any time I transport you in the car. Do you understand your rights, yes or no? *Id.* Vol. I at 113.

Captain Urban then proceeded to ask appellant questions that were clearly designed to elicit incriminating responses. Specifically, Captain Urban asked appellant whether there was anything he was not telling him; whether appellant owned a knife and where he could find a knife; why, hypothetically, appellant would have killed Devan; and what clothes appellant wore the day of Devan's murder. *Id.* at 114-116.Captain Urban also explained, to appellant, that the logical interpretation of the evidence was that appellant killed Devan.

So Devan goes in the woods at one forty five or last seen about one forty five and you're in the woods at maybe five minutes or three minutes to two and something happens to her just about the same time.

But there's nobody else in the woods but you and her at that time. What does that tell you? *Id.* at 117-118.

Once at the police department, Captain Urban directly asked appellant whether he stabbed Devan. State's Exh. L at 15.

Based on the series of questions asked by Captain Urban, we agree with the juvenile court that a reasonable twelve-year-old child would not believe that he could terminate the questioning and leave. During the period of time appellant was in the cruiser, the most appellant could have done was refuse to answer Captain Urban's questions. However, it is unlikely a reasonable twelve-year-old child would refuse to answer questions when he is in a police cruiser and a police officer is accusing him of committing murder and states that independent evidence proves it. Clearly, at that point, he could not get out of the moving cruiser and walk away. We agree with the juvenile court that once appellant's mother arrived in the room, at the police department, the tone of the questioning changed and the custodial interrogation by Captain Urban terminated.

Thus, under a de novo review, the facts of this case meet the appropriate legal standard. The trial court did not err when it partially granted appellant's motion to suppress statements he made to Captain Urban on July 2, 1998.

Appellee's First Assignment of Error on cross-appeal is overruled.

II

In its Second Assignment of Error on cross-appeal, appellee contends that the juvenile court erred when it failed to find that appellant knowingly and voluntarily waived his Miranda rights prior to questioning by Captain Urban. We disagree.

As with appellee's First Assignment of Error on cross-appeal, we must determine, under a de novo review, whether the facts of this case meet the appropriate legal standard. The juvenile court found that appellant did not make a knowing and voluntary waiver of his Miranda rights because they were given in a cursory manner and appellant was not given an opportunity to fully appreciate their meaning. Judgment Entry, Feb. 25, 1999, at 7. As previously discussed in appellant's Second Assignment of Error, we apply a totality-of circumstances approach in determining whether a valid waiver exists. Bobo, supra, at 689.

We have previously addressed several of these factors, which remain a constant, and we do not need to address again. However, we do need to consider the length and intensity of the interview, frequency of interrogation, existence of physical deprivation or mistreatment, and the existence of threat or inducement. Captain Urban questioned appellant for approximately fifteen minutes, in his police cruiser, as he drove appellant to the police department. The record further indicates Captain Urban continued to question appellant, at the police department, outside the presence of his mother. During this time with appellant, Captain Urban asked direct questions that

were likely to elicit incriminating responses from appellant. There is no indication of physical deprivation or mistreatment. However, as noted above, the questions asked by Captain Urban were likely to elicit incriminating responses.

Finally, we agree with the juvenile court that although Captain Urban read appellant his Miranda rights, he never explained them to appellant nor did he inquire of appellant to determine whether he understood what he was waiving. Captain Urban merely asked appellant if he understood and appellant responded "yes." Tr. Vol. I at 113. As a twelve-year-old child, we do not believe appellant knowingly, voluntarily and intelligently waived his Miranda rights. Based on the above, we agree with the juvenile court's conclusion that appellant did not make a valid waiver of his Miranda rights. Appellee's Second Assignment of Error on cross-appeal is overruled. For the foregoing reasons, the judgment of the Tuscarawas County Court of Common Pleas, Juvenile Division, is hereby affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

By: Wise, J. Gwin, P. J., and Hoffman, J., concur